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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER
REPORTER

VOLUME 89

DECISIONS BETWEEN MAY 28, 1918, AND TO OCTOBER 8, 1918

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OF THE

SUPREME COURT.

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HENRY L. BENSON.....Associate Justice
LAWRENCE T. HARRIS.....Associate Justice
WALLACE McCAMANT*.....Associate Justice
CHARLES A. JOHNS†.....Associate Justice
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* Resigned June 4, 1918.
† Appointed June 4, 1918.

DEPARTMENT NO. 1.

JUSTICE HENRY L. BENSON, Presiding Judge.
JUSTICE GEORGE H. BURNETT.
JUSTICE LAWRENCE T. HARRIS.

DEPARTMENT NO. 2.

JUSTICE HENRY J. BEAN, Presiding Judge.
JUSTICE FRANK A. MOORE.
JUSTICE CHARLES A. JOHNS.

THOMAS A. MCBRIDE, Chief Justice.

The Chief Justice, when present, will preside in both departments; in his absence the presiding judge. The Chief Justice at any time may change a justice from one department to the other.

By order of the Chief Justice, a case may be heard by the court sitting *in banc*, either before or after argument. In any case heard before a department, three justices must concur to render a valid judgment.

JUDICIAL DISTRICTS AND CIRCUIT JUDGES

IN THE

STATE OF OREGON

October 8, 1918.

First Judicial District—

Jackson, Josephine — FRANK M. CALKINS, Medford.

Second Judicial District—

Benton, Douglas — JAMES W. HAMILTON, Roseburg.

Curry, Coos — JOHN S. COKE, Marshfield.

Lane, Lincoln — GEORGE F. SKIPWORTH, Eugene.

Third Judicial District—

Linn — PERCY R. KELLY, Department No. 1, Albany.

Marion — GEORGE G. BINGHAM, Department No. 2, Salem.

Fourth Judicial District—

Multnomah:
- JOHN P. KAVANAUGH, Department No. 1, Portland.
- ROBERT G. MORROW, Department No. 2, Portland.
- ROBERT TUCKER, Department No. 3, Portland.
- GEORGE W. STAPLETON, Department No. 4, Portland.
- WILLIAM N. GATENS, Department No. 5, Portland.
- CALVIN U. GANTENBEIN, Department No. 6, Portland.

Fifth Judicial District—

Clackamas — JAMES U. CAMPBELL, Oregon City.

Sixth Judicial District—

Morrow, Umatilla — GILBERT W. PHELPS, Pendleton.

Seventh Judicial District—

Hood River, Wasco — FRED W. WILSON, The Dalles.

Eighth Judicial District—

Baker — GUSTAV ANDERSON, Baker.

Ninth Judicial District—

Grant, Harney, Malheur — DALTON BIGGS, Ontario.

Tenth Judicial District—
Union, Wallowa } JOHN W. KNOWLES, La Grande.

Eleventh Judicial District—
Gilliam, Sherman, Wheeler } DAVID R. PARKER, Condon.

Twelfth Judicial District—
Polk, Yamhill } HARRY H. BELT, Dallas.

Thirteenth Judicial District—
Klamath ..... DELMON V. KUYKENDALL, Klamath Falls.

Fourteenth Judicial District—
Lake ..... L. F. CONN, Lakeview.

Eighteenth Judicial District—
Crook, Deschutes, Jefferson } T. E. J. DUFFEY, Prineville.

Nineteenth Judicial District—
Tillamook, Washington } GEORGE R. BAGLEY, Hillsboro.

Twentieth Judicial District—
Clatsop, Columbia } JAMES A. EAKIN, Astoria.

DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

October 8, 1918.

County.	Name.	Official Address.
Baker	Levens, W. S.	Baker
Benton	Clarke, Arthur	Corvallis
Clackamas	Hedges, Gilbert L.	Oregon City
Clatsop	Judd, Edw. C.	Astoria
Columbia	Metsker, Glen R.	St. Helens
Coos	Hall, John F.	Marshfield
Crook	Wirtz, Willard H.	Prineville
Curry	Buffington, Collier H.	Gold Beach
Deschutes	DeArmond, H. H.	Bend
Douglas	Neuner, George, Jr.	Roseburg
Gilliam	Weinke, T. A.	Condon
Grant	Ashford, Phil.	Canyon City
Harney	Biggs, M. A.	Burns
Hood River	Derby, A. J.	Hood River
Jackson	Roberts, G. M.	Medford
Jefferson	Boylan, Bert C.	Metolius
Josephine	Miller, W. T.	Grants Pass
Klamath	Duncan, William M.	Klamath Falls
Lake	McKinney, T. S.	Silver Lake
Lane	Ray, L. L.	Eugene
Lincoln	Hawkins, Calvin E.	Toledo
Linn	Hill, Gale S.	Albany
Malheur	Swagler, R. W.	Malheur
Marion	Gehlhar, Max	Salem
Morrow	Notson, Samuel E.	Heppner
Multnomah	Evans, Walter H.	Portland
Polk	Piasecki, E. K.	Dallas
Sherman	Huddleston, C. M.	Wasco
Tillamook	Goyne, T. H.	Tillamook
Umatilla	Keator, R. I.	Pendleton
Union	Hodgin, John S.	La Grande
Wallowa	Fairchild, Abijah	Enterprise
Wasco	Galloway, Francis V.	The Dalles
Washington	Tongue, E. B.	Hillsboro
Wheeler	Trill, Wallace G	Fossil
Yamhill	Conner, Roswell L.	McMinnville

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CASES DECIDED

IN THE

SUPREME COURT

OF

OREGON.

Argued at Pendleton May 7, affirmed May 28, 1918.

SCHIRBER *v.* GREENE.

(173 Pac. 256.)

Payment—Application by Agreement.

1. Where owner of land encumbered with two mortgages, one of $4,000 and one of $5,000, sold the same, with agreement with the purchaser to execute a mortgage of $10,000 to pay off the two mortgages and apply balance to an unsecured debt, but agreed with mortgagee in new mortgage, of which agreement the purchaser had no notice, to pay off one mortgage and apply balance to unsecured debts, leaving one mortgage outstanding, except for payment of any balance of the $10,000 on the unpaid mortgage, there was no contractual relation between mortgagee and purchaser, so as to establish plea of payment by the purchaser of the whole of the unpaid mortgage.

[As to application of payments, see notes in 13 **Am. Dec.** 505; 14 **Am. Dec.** 694; 96 **Am. St. Rep.** 44.]

From Morrow: GILBERT W. PHELPS, Judge.

In Banc.

This is a suit in the usual form to foreclose a mortgage given by Greene and his wife to the plaintiff, covering certain lands in Morrow County, as a security for the payment of their $5,000 note of January 30, 1911, payable to the order of plaintiff six months after its date, with interest at 8 per cent per annum. Gritman and his wife are made defendants under an allegation to the effect that they have or claim some estate in the mortgaged premises, but that the same is subsequent

in time and inferior in right to the plaintiff's mortgage. Greene and his wife filed one answer and Gritman joined his wife in another. They all admit the execution and delivery of the note and mortgage described in the complaint. The Greenes affirmatively state that they themselves had paid the note and mortgage in full prior to the commencement of the suit, and that the plaintiff had agreed to discharge the same. The Gritmans answer that the instruments in question were paid and satisfied in full, without stating by whom that result was effected. The new matter in both answers was traversed by the reply. From a decree personal against Greene and his wife for the sum of $1,950.35 with interest at 8 per cent per annum from March 6, 1914, and for $150 attorneys' fees and costs, and foreclosing the mortgage for these amounts, the Gritmans alone appealed. AFFIRMED.

For appellants there was a brief over the names of *Mr. Lawrence A. McNary* and *Mr. R. A. Imlay,* with an oral argument by *Mr. McNary.*

For respondent there was a brief over the name of *Messrs. Smith & Mack,* with an oral argument by *Mr. M. E. Mack.*

BURNETT, J.—It is disclosed by the record that Greene was the owner of the land in question, subject to a first mortgage securing $4,000 and interest to the Traders' National Bank of Spokane, Washington, and a second mortgage of $5,000 in favor of the plaintiff, upon which this suit is based; and was negotiating with Gritman with a view of selling the realty to the latter. Both these mortgages had matured. Greene was also indebted to the plaintiff upon three unsecured promissory notes, one for $1,000, a second for $500 and a third

for $100. Gritman was unwilling to take the land subject to matured encumbrances, but was willing to assume such a lien to the extent of $10,000. Under these circumstances Greene applied to the plaintiff to take up the $4,000 mortgage to the Traders' National Bank and release his own $5,000 mortgage, taking in lieu thereof one for $10,000 on the property and extending the time for payment so that Gritman would take the estate thus burdened. Schirber's contention is that a condition of the ensuing agreement was that Greene should pay in full his unsecured indebtedness, before the former would release his $5,000 mortgage or take up that of the bank. The contention of Gritman is that nothing was said about the unsecured indebtedness, and that Schirber represented that the $10,000 mortgage would clear all claims against the land. The mortgage to secure the $10,000 was dated March 6, 1914. The date of its record is not disclosed by the testimony, but it does appear that designedly it preceded the record of the deed from Greene to Gritman.

There is testimony on behalf of the defendants to the effect that Schirber was present in Spokane when Greene and the representatives of Gritman, who was not there in person, were negotiating about the sale of the land to the latter, and then and there represented that $10,000 would cover all claims against the property. All agree, however, that he did not at the time satisfy the mortgage in suit. He denies and witnesses for the defendants affirm that he represented that he did not have with him either the mortgage or sufficient data by which to frame a satisfaction piece, but promised to send the same to Greene at a later date, and accordingly the matter was left open. Schirber testified to the effect that he told them he would satisfy the mortgage when Greene paid up all arrearages and de-

livered the notes and mortgage for the $10,000 to be embodied in the new encumbrance. From the documentary evidence on file, including the check drawn by Schirber to satisfy the Traders' Bank mortgage, as well as by the testimony of Schirber and Greene, it is well established that the final settlement between those two did not occur until May 28, 1914, at which time they calculated the interest on the Traders' Bank mortgage, on the note and mortgage in suit, as well as upon the three unsecured notes already mentioned, amounting in all to $11,950.35; from which they deducted the $10,000 represented by the new mortgage, crediting upon the note and mortgage in suit the overplus of $10,000 remaining after applying the same to the satisfaction of the other outstanding obligations mentioned.

The only question raised by the pleadings is the payment of the note and mortgage in suit. This the defendants affirm, assuming the burden of proof, and the plaintiff denies. Although the Gritmans, at least, had an opportunity, when they filed their answer, to plead against Schirber an estoppel to the effect that he stood by and saw them purchase the land encumbered by the two mortgages and represented to them that they constituted all he claimed against the Greenes and would be satisfied by the $10,000 mortgage to be placed thereon by Greene and that he would discharge the two mortgages on receipt of the new one, which he failed to do, yet no estoppel was stated in the defendants' pleading.

1. The determination of the suit must depend upon the solution of the issue of payment. It is plain that Greene and Schirber regarded the new mortgage for $10,000 as payment of so much money, within the meaning of *Bush* v. *Abraham*, 25 Or. 336 (35 Pac. 1066), and *Cranston* v. *West Coast Life Ins. Co.*, 63 Or. 427 (128

Pac. 427), cited by the defendants Gritman. The question is one of application of payment. That was the proper subject of contract between Greene and Schirber. They concur in stating it was agreed as a condition of the latter's releasing the $5,000 mortgage and taking up the Traders' Bank mortgage that Greene should discharge the unsecured indebtedness. Both agree that this was not done except in the settlement of May 28th. They both testify, likewise, that at that adjustment the $10,000 represented by the new mortgage was applied to the unsecured indebtedness and the Traders' Bank mortgage, and that the residue was credited on the note and mortgage in suit. That was what was actually done, whatever the previous agreement may have been between the actual debtor and creditor, Greene and Schirber. Whatever may be said of the initial agreement on that subject, it was clearly executory and was not fulfilled. Gritman was not a party to either of the stipulations between Greene and Schirber and is in no situation to rely upon the first as an application of payment, for the very reason that it was not carried out. There was no contractual relation between Schirber and Gritman, hence as between them there is nothing to establish the plea of payment made by the latter.

The legal effect of the transaction was that Gritman took the land subject not only to the $10,000 mortgage but also to the unsatisfied prior mortgages, knowingly leaving it in the power of Schirber to enforce the payment at least of the one for $5,000 which he owned. Schirber found Greene equipped with the $10,000 mortgage and with power to appropriate it to whatever he chose of his indebtedness, and as against the plea of payment had the right to agree with Greene to apply

it to the unsecured indebtedness, which it appears they did, resulting in the discomfiture of Gritman.

It is true, as the authorities cited by Gritman show, that if indeed the payment had actually been applied to the discharge of the two mortgages upon the land, the one to the bank and the other to Schirber, neither Greene nor Schirber could afterwards change the application to the damage of Gritman, the subsequent purchaser of the land. But this is not what happened. At best there was between Greene and Schirber an executory contract which might have thus resulted if it had been observed, but it was never carried out and the parties to it substituted and performed a new agreement by which the application was made to the bank's mortgage and the unsecured indebtedness due from Greene to Schirber, and the balance credited on the note in suit as stated.

There is practically no dispute as to what was in fact done by the parties. Tested by the canon of the pleadings, the defense of payment as distinguished from estoppel is not the conclusion to be drawn from the facts. The plea of payment not having been sustained, the result is that the decree of the Circuit Court must be affirmed. AFFIRMED.

Argued at Pendleton May 7, appeal dismissed May 28, 1918.

OREGON-WASH. R. & N. CO. *v.* SCHOOL DIST. No. 25.

(173 Pac. 261.)

Appeal and Error—Effect of Appeal—Vacating Decree.

1. The trial court does not lose its jurisdiction to vacate a decree and render a new one because an appeal from the decree has been perfected, prior to the hearing on the appeal.

Appeal and Error—Dismissal—Vacating Decree Appealed from.

2. Where a decree pending appeal therefrom, but before hearing on appeal, is vacated, and a new decree entered, the latter supersedes the former as the final decree, and is the only one from which an appeal will lie, and the appeal from the former must be dismissed.

Appeal and Error—Dismissal of Appeal—Want of Sufficiency.

3. Since no more can be done on appeal than to vacate the decree appealed from and render another, where such has been done by the trial court, pending the appeal, from which action no appeal has been taken, there is want of actual controversy, only an academic question remaining, and the appeal must be dismissed.

From Morrow: GILBERT W. PHELPS, Judge.

In Banc.

This is a suit by the plaintiff against the school district, its directors and clerk, to prevent them from entering into a contract for or building a schoolhouse in the district. Plaintiff's claim in substance is that there are but about two hundred inhabitants in the district, which is approximately twelve miles long and eleven miles wide; that the average daily attendance at the school for the last preceding year was only a fraction over fifteen pupils; and that the building proposed to be erected was extravagant in the extreme, considering the needs of the district.

The cause was put at issue and on September 4, 1917, the court entered a decree said therein to be in pursuance of the consent of both parties, which, after some

details respecting the extent to which the proposed plans and specifications should be followed, enjoined the district from incurring any greater expense than nine thousand dollars for the proposed building. On October 24, 1917, the defendants filed a motion to vacate the findings of fact and conclusions of law and the resultant decree already mentioned, and supported their application by affidavits of the directors and counsel for defendants to the effect that they had not agreed to any such result. On October 30th the defendants served their notice of appeal from the decree of September 4th. The abstract contains an exemplification of an undertaking on appeal on behalf of the defendants but does not disclose when that obligation was filed. We may assume, however, for the purposes of this decision, that the appeal was perfected within five days after the service of the notice of appeal. Meanwhile, the motion to set aside the decree remained undecided, until November 10, 1917, within the term at which the first decree was rendered, when the court, after reciting some matters tending to show that a decree by consent had been authorized, entered another decree vacating the one of September 4th, and entered another making more concise directions about the extent of the proposed building and limiting the cost thereof to the sum of nine thousand dollars. Based upon this record the plaintiff moves to dismiss the appeal. APPEAL DISMISSED.

For appellants there was a brief over the name of *Messrs. Richards & Richards,* with an oral argument by *Mr. Orin E. Richards.*

For respondent there was a brief over the names of *Mr. John F. Reilly, Mr. Blaine Hallock, Mr. S. E. Van*

Vactor and *Mr. Arthur C. Spencer,* with an oral argument by *Mr. Reilly.*

BURNETT, J.—1, 2. The only notice of appeal in the record is from the decree of September 4, 1917. The defendants contend that, having perfected their appeal from that adjudication, the Circuit Court was ousted of any authority to set it aside and hence that its decree of November 10, 1917, was a nullity and cannot be regarded for the purposes of the present motion. In *Brewster* v. *Springer,* 79 Or. 88 (154 Pac. 418), in an opinion by Mr. Chief Justice MOORE, this court held that:

"Notwithstanding an appeal from a judgment may have been taken and perfected, jurisdiction of the cause is retained by the trial court sufficient to empower it at any time before the appeal is heard and determined to amend the bill of exceptions so as to make it conform with the facts."

Reasoning by analogy to the rules enunciated in the precedents there cited, it was held that a trial court within the time limited therefor may set aside its own judgment and render a new one, and that it is not only within its power so to do, notwithstanding an appeal may have been taken and not heard, but it is its duty to do so, in order to save the expense of an appeal. That is what has been done in the present instance. Responding to the attack of the defendants upon the first decree, the court set the same aside and rendered another. The one appealed from is no longer in existence, hence there is nothing before us for decision. The decree of November 10, 1917, supersedes the former determination and is the final adjudication of the matters in dispute. It constitutes the only decision from which an appeal will lie, and the court will

not do the vain thing of affirming or reversing that which does not exist.

3. The revision of the decree appealed from has been accomplished by the authorized action of the trial court. We could not do more on the defendants' appeal than to replace with another the decree of which they complained. That has been accomplished by the trial court in regular procedure. For aught that appears the later decision of the Circuit Court may be satisfactory to the defendants. At least we may presume so in the absence of any appeal from it. At best the appeal before us presents only an academic question which we are not called upon to decide: *Moores* v. *Moores,* 36 Or. 261 (59 Pac. 327); *State ex rel.* v. *Grand Jury,* 37 Or. 542 (62 Pac. 208); *State ex rel.* v. *Webster,* 58 Or. 376 (114 Pac. 932); *Francis* v. *Schuman,* 74 Or. 454 (145 Pac. 668); *Dimick* v. *Latourette,* 72 Or. 231 (143 Pac. 896); *Stires* v. *Sherwood,* 75 Or. 108 (145 Pac. 645); *Ireland* v. *Sherman County,* 75 Or. 241 (146 Pac. 969). The motion to dismiss the appeal must be allowed. APPEAL DISMISSED.

Argued April 4, affirmed May 28, 1918.

WOODARD *v.* WILLAMETTE VAL. IRR. LAND CO.*

(173 Pac. 262.)

Vendor and Purchaser—Rescission of Contract by Agreement—Abandonment of Rights.

1. Where purchaser rescinds contract and sues vendor for money paid thereon and for value of improvements made, vendor by interposing counterclaim for rent, thus recognizing purchaser as tenant, assents to such rescission, and terminates contract, regardless of whether purchaser had good ground for rescission.

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*As to necessity of mutual consent on right to rescind contract without liability for nonperformance, see note in 30 **L. R. A.** 40.
REPORTER.

Vendor and Purchaser—Rescission—Recovery of Purchase Price.

2. Where a contract for sale of land has been rescinded by mutual assent, the purchaser, where there is no agreement to the contrary, may recover the amount paid on the purchase price.

[As to return of purchase money on repudiation of void contract, see note in **Ann. Cas.** 1914C, 898.]

Vendor and Purchaser—Abandonment of Contract by Vendor—Rights of Purchaser.

3. Where an irrigation company selling land fails to supply the water called for by the contract of sale, the purchaser may elect to rescind the contract and recover what he has paid thereon.

Vendor and Purchaser—Rescission—Revival.

4. Where purchaser rescinding contract sues for money paid thereon, the vendor, by acquiescing in such rescission by interposing a counterclaim and treating purchaser as tenant, terminates the contract, and cannot by waiving such counterclaim revive it.

Appeal and Error—Review—Harmless Error.

5. Where evidence showed a contract had been rescinded by mutual assent, the admission of parol evidence tending to vary the terms thereof, if error, was harmless.

From Marion: PERCY R. KELLY, Judge.

Department 2.

This is an action for money had and received. The cause was tried to the court and jury and a judgment followed in favor of plaintiff. Defendant appeals.

The action is founded upon the rescission of a written contract entered into between plaintiff Woodard and the defendant Willamette Valley Irrigated Land Company on August 27, 1913, for the sale by the latter to the former of 17.06 acres of described land in Marion County, with a water right for the price of $4,265, $1,000 of which was paid at the time of the contract, the balance being payable in deferred payments with interest at 6 per cent per annum. By the terms of this agreement the defendant agreed to furnish a certain amount of water necessary to irrigate the land during the irrigation season of each year between May 1st and October 1st of each year, beginning with

1914. All the details as to the time of payments, as to a conveyance of the land upon the payments being made, the manner of furnishing the water, and other stipulations are set forth in the contract. It was covenanted that the buyer should pay the seller on the first day of April of each year, subsequent to January, 1915, one dollar and a half per acre as maintenance fee for the use of water and pay all taxes levied against the property. The instrument contained a time essence clause and the following provisions:

"That in the event of default being made by said buyer in the payment of any of the sums of money at the times when the same shall become due as aforesaid, or if default be made in any other particular in any of the stipulations on the part of the said buyer herein contained, then, at the option of said seller, its successors or assigns, and after notification by it to that effect, this contract shall become void, and of no effect, and the buyer shall thereupon cease to be entitled to any benefits thereunder, and all payments of money made hereon by the buyer shall be forfeited as liquidated damages for the failure of said buyer to comply with the terms of this contract, and said buyer shall, on demand of said seller, promptly quit and deliver up said premises to the seller."

The written agreement found in the record appears to be plain, full and complete.

About August 10, 1915, plaintiff gave defendant notice of rescission of the contract for the reason that the company had failed, *inter alia,* to supply water for irrigation on May 1, 1914, and he claims such failure continued until July 9th of that year. He demanded a return of the $1,000 paid on the contract and $650 for improvements made by him upon the land, tendered defendant possession and a quitclaim deed of the premises and offered to account to the

company for the rents and profits during his occupancy when it should comply with the demand. Upon defendant's refusal so to comply, plaintiff instituted this suit, alleging, in substance, the facts above stated and that defendant waived plaintiff's payment of April 1, 1915, for water for the said year and extended the time for the payment of interest due as per contract from August 27, 1914, until August 27, 1915; and that plaintiff had fully performed his agreement.

Defendant answered and counterclaimed, denying all the allegations of the complaint "except as hereinafter stated," set forth the contract in full and averred in effect that plaintiff failed to perform his contract in not paying interest due defendant August 27, 1914, and a maintenance fee of $25 for water due April 1, 1915; and that defendant on its part fully performed the contract as modified. As a further answer defendant counterclaimed $170 for the use by plaintiff of the contracted premises from August 27, 1914, to September 1, 1915, whereupon plaintiff filed a supplemental complaint with the additional averment to the purport that without otherwise attempting to terminate the written agreement defendant had disregarded the same by taking possession of the land and had assented to the rescission of the contract by attempting to recover of plaintiff $170 rent while he was in possession of the premises under the terms of the sale contract. Defendant answered the supplemental complaint, as before, and again counterclaimed for the rent.

The reply controverted the answer and counterclaim, except as set forth in the complaint and save as to his occupancy of the premises. Other matters in the respective pleadings will be referred to hereafter.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Maurice W. Seitz* and *Messrs. Carson & Brown,* with oral arguments by *Mr. Seitz* and *Mr. Thomas Brown.*

For respondent there was a brief with oral arguments by *Mr. Samuel M. Endicott* and *Mr. Walter C. Winslow.*

BEAN, J.—The principal assignments of error are: That the court erred in submitting to the jury the counterclaim of defendant; that after plaintiff rescinded the contract defendant acquiesced in such rescission and thereby rendered the same mutual; and that the Circuit Court erred in giving the following instructions to the jury:

"If you find from the evidence that plaintiff's rescission of contract was acquiesced in, provided rescission has been proven, by any conduct or acts of defendant, then I instruct you that plaintiff is entitled to recover the amount he has put into said property, as the evidence presents that view, if at all, to you."

Also: "I further instruct you that defendant cannot recover rent from plaintiff for the time that plaintiff occupied said premises upon any other theory than that said contract was terminated. * * "

Upon the trial defendant's counsel stated that defendant waived its counterclaim and, as stated in their brief, "maintained that the counterclaim was in the nature of an offset to be set off against the value of the improvements," and defendant introduced evidence as to the reasonable value of plaintiff's occupancy of the land. The plaintiff introduced in evidence defendant's original answer, counterclaiming for rents and profits amounting to $170 for the purpose of showing that defendant assented to the rescis-

sion. It should be stated that the sale contract made no provision for the payment of rent by the buyer under any circumstances.

1. As we view this case, the question of mutual rescission of the contract to purchase is the determinative one. It will be observed that in its two separate answers the defendant by appropriate allegations demanded a recovery from plaintiff of the sum of $170 as the reasonable value of the use of the premises during the time they were occupied by him under the terms of the sale contract. Such a recovery could not be had under any other theory than that the contract had been terminated. There is no claim made on behalf of defendant that it attempted to abrogate the agreement in accordance with the terms thereof or in any other manner; hence, it necessarily follows that the defendant by treating the contract as at an end and demanding rent for the property, thus recognizing the purchaser as a tenant, assented to the rescission asserted by plaintiff. This would be so although the plaintiff might be wrong in his contention to rescind the contract.

2. Mr. Parson in his work on Contracts, vol. 2, Section 678, states the rule thus:

"If either party, without right claims to rescind the contract, the other party need not object, and if he permit it to be rescinded, it will be done by mutual consent."

See also: 13 C. J., § 624, p. 601; *McKenna* v. *McKenna,* 118 Ill. App. 240; *Ralya* v. *Atkins,* 157 Ind. 331 (61 N. E. 726); *Moline Jewelry Co.* v. *Crew,* 171 Ala. 415 (55 South. 144); *Kingman Colony Irr. Co.* v. *Payne,* 78 Or. 238 (152 Pac. 891). Each party having consented to a rescission of the contract (*Hobbs* v. *Columbia Falls Brick Co.,* 157 Mass. 109

(31 N. E. 756), neither can base a claim on such contract except in so far as is necessary to the restoration of the *status quo*. As a general rule, when the contract for the sale of land has been rescinded by the mutual assent and agreement of the parties, the contract is at an end and there being no agreement to the contrary, the vendee, not being at fault, may recover back the money paid on his contracts: 2 Black on Rescission, § 535; 2 Warvelle on Vendors, § 826; 13 C. J., § 627, p. 602; 39 Cyc. 2029; *Vider* v. *Ferguson,* 88 Ill. App. 136, 150; *Bannister* v. *Read,* 1 Gil. (6 Ill.) 100; *Bryson* v. *Crawford,* 68 Ill. 362; *Prentice* v. *Erskine,* 164 Cal. 446 (129 Pac. 585); *Cummings* v. *Rogers,* 36 Minn. 317 (30 N. W. 892); *Maffet* v. *Oregon & Cal. R. Co.,* 46 Or. 443, 457 (80 Pac. 489). At page 457 of the opinion in the last-named case, Mr. Chief Justice WOLVERTON quotes the following from *Glock* v. *Howard & W. Colony Co.,* 123 Cal. 1, 10 (55 Pac. 713, 69 Am. St. Rep. 17, 43 L. R. A. 199):

"There have been many cases before this court involving the rights of parties to agreements for the sale and purchase of real estate, in which it has been held that, after the parties have rescinded the agreement or mutually agreed to abandon, the vendee may recover the money which he paid in part performance of his contract"—citing cases.

The general rule in regard to restoration of the *status quo* is stated to the same effect in 6 R. C. L., p. 936, § 316.

3. The principle involved as to the right of Woodard, the vendee, to recover the money paid upon his contract to purchase when the vendor company abandoned its contract is settled by the opinion of this court written by Mr. Justice MOORE in *Graham* v. *Merchant,* 43 Or. 294, 304 (72 Pac. 1088).

"When a vendor abandons his contract to convey, the vendee, in his choice of remedies, may elect to rescind the contract, and thereupon maintain an action at law to recover what he has paid thereon, as money had and received: *Lyon* v. *Annable,* 4 Conn. 350; *McKinnon* v. *Vollmar,* 75 Wis. 82 (43 N. W. 800, 17 Am. St. Rep. 178, 6 L. R. A. 121); *Glock* v. *Howard & W. Colony Co.,* 123 Cal. 1 (55 Pac. 713, 69 Am. St. Rep. 17, 43 L. R. A. 199)."

In *Mitchell* v. *Hughes,* 80 Or. 574, 584, 585 (157 Pac. 965), Mr. Justice MCBRIDE not only cites with approval the case of *Graham* v. *Merchant,* 43 Or. 294 (72 Pac. 1088), but approves the following text from 39 Cyc. page 1354:

"Where one of the parties has abandoned the contract, the other thereupon has a choice of remedies. He may stand upon his contract, refusing assent to his adversary's attempt to rescind it, and sue for a breach, or, in a proper case, for a specific performance, or he may acquiesce in the abandonment and treat the contract as rescinded, and thus effect a dissolution of the contract by mutual and concurring assent of both parties. He cannot, however, treat the contract as abandoned by the other party and at the same time enforce its obligation."

4, 5. Rescission by the parties of a contract to convey contemplates not only destruction of the contract, but also restoration of the parties to their former estate or situation: *Miles* v. *Hemenway,* 59 Or. 318, 338 (111 Pac. 696, 117 Pac. 273). The waiver of the counterclaim and the attempt to convert the same into a recoupment by defendant was ineffectual as a revival of the contract of sale, as after a contract has been rescinded, it can be revived only by the mutual assent of the contracting parties. It matters not what we denominate defendant's demand for rent. The defendant in this case could not alone apply the

pulmotor so as to restore the life of the contract: 13 C. J., § 627, p. 603; 6 R. C. L., § 315, p. 932; *Dixon-Hanson Co.* v. *Svoboda,* 161 Ill. App. 410.

The charge to the jury upon this phase of the case was well within the law. The practical effect of the instructions quoted and complained of was to require the jury, if they found in favor of plaintiff as to the other facts of the case which were fairly proved, to find for plaintiff upon this point, that is, that the contract had been rescinded by mutual assent. There was no error in this part of the charge. As we suggested, this question being the turning point in the case, it renders it of but little avail to consider any of the other questions argued. It was fairly shown and the jury found that the plaintiff had complied with the terms of the contract on his part, and that the defendant failed to furnish plaintiff with water for irrigation during the season of 1914 according to its agreement, and that his crops suffered for want thereof. There is no question raised affecting the finding of the jury as to the value of the improvements made by plaintiff on the land. It is alleged and the evidence admitted tended to show that defendant failed to keep its oral agreement made during the negotiations leading up to the sale contract and not included therein, to equip a cannery and furnish a market for the products raised by the plaintiff on the land. Assuming without deciding that the admission of such evidence for the purpose of showing a further breach of the contract by defendant was error as varying the terms of the written contract, yet as the defendant assented to the rescission of the agreement we cannot see how such evidence could possibly change the result of the deliberations of the jury. It would serve no good purpose if error should be de-

clared to remand this cause for a retrial of an issue which would not affect the decision of the case. The evidence is all contained in the record. Applying Article VII, Section 3, of the Constitution, after a consideration of all the matters contained in the record, we are of the opinion that the judgment appealed from was correct. We find no reversible error in the case and the judgment of the lower court is therefore affirmed. AFFIRMED.

McBRIDE, C. J., MOORE and BENSON, JJ., concur.

Submitted on briefs at Pendleton May 6, affirmed May 28, 1918.

WARM SPRINGS IRRIGATION DIST. *v.* PACIFIC LIVESTOCK CO.*

(173 Pac. 265.)

Eminent Domain—Right to Abandon Condemnation Proceedings.

1. An irrigation district, bringing proceedings to condemn private land for a dam and reservoir site, may abandon such proceedings any time prior to actually depositing money to be paid.

[As to discontinuance of eminent domain proceedings and at what time it may be ordered, see note in 86 Am. Dec. 199.]

Eminent Domain Proceedings—Voluntary Nonsuit—Attorney's Fees—"Trial."

2. Section 6868, L. O. L., as amended by Laws of 1913, page 81, providing for payment of attorney's fees to defendant in eminent domain proceedings "to be fixed by the court at the 'trial,'" has reference to main trial of the cause, and to entitle defendant to no attorney's fees upon voluntary nonsuit.

Eminent Domain Proceedings—Costs—Common Law.

3. A party to eminent domain proceedings, having no right to recover costs at common law, is entitled thereto only as provided by statute.

Statutes—Construction—Intention of Legislature.

4. A statute should be construed according to the intention of legislature enacting it, which can only be discerned by considering the statute and section as a whole.

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*On right of condemning party to dismiss condemnation proceedings after award or verdict, and before confirmation of judgment, see note in 28 L. R. A. (N. S.) 91.

The question of validity of statutory provision for attorney's fee is discussed in notes in 17 L. R. A. (N. S.) 910 and L. R. A. 1915E, 943. REPORTER.

Costs—Voluntary Nonsuit.

5. Where the statute does not specify what costs shall be paid upon voluntary nonsuit, the usual costs provided by statute will be taxed.

Eminent Domain Proceedings—Pleading—Tender.

6. In eminent domain proceedings a complaint, alleging that plaintiff offered to pay defendant $25,000 for the land; that the offer was refused; that plaintiff is ready, willing and able to pay such sum for the land,—is sufficient allegation of tender and refusal.

Eminent Domain—Costs—Tender—Statutes.

7. Section 574, L. O. L., applying to actions generally and providing for costs to defendant in case of tender, before suit, of amount greater than judgment, does not apply to eminent domain proceedings; this being a special proceeding governed by Section 6868, which is exclusively applicable to eminent domain proceedings.

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

Plaintiff commenced this proceeding in eminent domain against defendant, and alleged among other things that plaintiff tendered to defendant the sum of $25,000, for the lands desired to be taken for a dam and reservoir site and right of way and operation of an irrigation system, which defendant refused to accept.

Defendant answered and set up that it had employed counsel to defend the action and asked judgment for the value of their services. Plaintiff moved the court to dismiss the proceedings, without prejudice. Defendant requested the court to impose as a condition to the dismissal the payment of costs and $1,000 as a reasonable attorney's fee. The trial court granted plaintiff's motion to dismiss, and gave defendant judgment for costs, but refused judgment for the $1,000 as attorney's fee. Thereupon defendant filed its memorandum of costs and disbursements, including $1,000 counsel fees. On motion of plaintiff the court struck out the item of counsel fee, holding that defendant was not entitled thereto. Defendant appealed.

AFFIRMED.

For appellant there was a brief submitted over the names of *Mr. Edward F. Treadwell, Mr. P. J. Gallagher* and *Mr. John L. Rand.*

For respondent there was a brief prepared and submitted by *Messrs. Davis & Kester.*

BEAN, J.—The question to be reviewed upon this appeal depends upon the construction to be given to Section 6868, L. O. L., as amended by the General Laws of Oregon, 1913, page 81. which is as follows:

"The costs and disbursements of the defendant, including a reasonable attorney's fee to be fixed by the court at the trial, shall be taxed by the clerk and recovered from the corporation, but if it appear that such corporation tendered the defendant before commencing the action an amount equal to or greater than that assessed by the jury, in such case the corporation shall recover its costs and disbursements from the defendant, but the defendant shall not be required to pay the plaintiff's attorney fee."

1. The construction of this section as to the question involved has not been passed upon by this court. It was attempted to be presented in the case of *Portland & O. C. Ry. Co.* v. *Doyle,* 86 Or. 206 (167 Pac. 270, 168 Pac. 291), but the appeal did not permit the question to be determined. It may be stated as a premise that until plaintiff had actually deposited the money tendered, it had the right to abandon the proceeding: *Oregon R. & N. Co.* v. *Taffe,* 67 Or. 102, 111 (134 Pac. 1024, 135 Pac. 332, 515). That is in effect the present status of this case on the motion for a voluntary nonsuit. The question is, Does plaintiff by that motion incur liability, under the provision of the statute quoted, for a reasonable attorneys' fee to be fixed by the court, or do the mere costs provided for by the

statutes generally suffice to appease defendant's demands?

2. The language of the statute referred to is that the costs and disbursements of the defendant, including a reasonable attorneys' fee to be fixed by the court "at the trial," shall be taxed; but to this is attached the proviso that if it appear that plaintiff made a tender before commencing the action equal to or greater than the amount assessed by the jury, the defendant is required to pay the usual costs. Such reasonable attorneys' fee is to be fixed by the court "at the trial." A trial is the judicial examination of the issues between the parties, whether they be issues of law or fact: See "Trial," 2 Bouvier's Law Dictionary. For various purposes, a hearing on a demurrer is a trial and so is the hearing on the question of attorney's fee, as suggested by counsel; but does the statute mean such a trial, or does it mean a trial of the subject matter of the action. The subject of the litigation is the damages to the property proposed to be taken. Hearing on demurrer, attorney's fee, motion, or trial is not "the trial" as to the subject of the litigation, but of matters merely incident to and growing out of the litigation of the subject matter of the action.

When the lawmakers provided that in such a proceeding a reasonable attorney's fee should be fixed by the court "at the trial" it is apparent from the examination of the whole section and of all of the provisions for proceedings in condemnation that they had in mind the main or final trial of the cause. Before the defendant should be allowed such attorney's fee it must appear that the amount tendered by the plaintiff was less than the amount "assessed by the jury"; and if the amount tendered is equal to or more

than that assessed by the jury, "the corporation shall recover its costs and disbursements" from the defendant. Therefore, to determine whether the defendant is entitled to such attorney's fee it is, under the provision of the act indispensable that the court have knowledge of the amount tendered and also of the amount assessed by the jury. It may be true that defendant has incurred expenses, including retainers of attorneys, but that alone does not place the defendant in any different position from that of any other defendant in a case terminating by a voluntary nonsuit which is governed by the general and not the special statute. The plaintiff has, so far as this proceeding is concerned, abandoned and renounced its intention to take the property. The subject of the action has not been tried and no amount of damages has or could be assessed. In 10 R. C. L., Section 200, page 238, it is stated:

"As a general rule when condemnation proceedings are dismissed or abandoned in good faith, and without unreasonable delay, the owner of the land sought to be taken is not entitled to be made whole for the expenses to which he has been put in preparing for trial or the loss he may have suffered by the removal of tenants or interference with his plans in regard to the use of the property."

The matter is governed by statute, and the lawmakers of this state have not decreed that a reasonable attorney's fee should be paid upon a voluntary nonsuit. The opinions of the courts of other states having statutes different from Section 6868 are of no special assistance.

3–5. At common law neither party could recover costs in such a proceeding. It is strictly a matter for statutory regulation: 2 Lewis, Eminent Domain, § 812.

Section 6860, L. O. L., provides:

"Such action shall be commenced and proceeded in to final determination in the same manner as an action at law, except as in this title otherwise specially provided."

It is urged by the learned counsel for defendant that the provision, that if it appear that the plaintiff's corporation tendered to the defendant before commencing the action an amount equal to or greater than that assessed by the jury, is in the form of an exception and cannot operate until those things appear. Also that the complaint alleges no tender. In order to discern the legislative intent which is the main object we should look at the whole section and statute: Endlich, Interpretation of Statutes, § 295; *State* v. *Simon,* 20 Or. 365 (26 Pac. 170); *Duncan* v. *Dryer,* 71 Or. 548, 557 (143 Pac. 644). The arrangement of Section 6868, after a judgment and appeal therefrom has been cared for by the enactment, comes like a benediction near the close. The law contemplates that such fee shall be taxed after trial and judgment. The position of this section, with other earmarks, indicates that the legislature overlooked or made no provision for such attorney's fee in such a case if there is a voluntary nonsuit. The real question is, Who is entitled to costs? The case had not progressed far enough for a solution of that inquiry except by an application of the general provisions of the statute for the usual costs, which in the absence of statutory enactment to the contrary is the regular penalty when a voluntary nonsuit is taken. No doubt the lawmakers could increase the forfeit in such cases, but we do not find that they have attempted to do so.

6, 7. As to the alleged tender the language of the complaint is

"That plaintiff has heretofore offered to pay to defendant for said lands the sum of Twenty-five Thousand Dollars ($25,000), which sum the defendant has failed and refused to accept; and the plaintiff is ready, able and willing to pay therefor the said sum, and now here offers to pay to defendant for said lands the full sum of Twenty-five Thousand ($25,000) Dollars."

The answer questions the plaintiff's good faith and ability in making the offer on account of the amount thereof and "admits that the plaintiff has heretofore offered to pay to the defendant for said lands the sum of $25,000." As we understand the pleadings a tender was made and refused. This is a special proceeding and is governed in this respect by Section 6868. We cannot resort to Section 574, L. O. L.

We concur in the opinion of the learned trial judge. The judgment of the lower court is affirmed.

AFFIRMED.

Argued at Pendleton May 7, affirmed May 28, 1918.

CRAIG v. CRYSTAL REALTY CO.

(173 Pac. 322.)

Equity—Depositions—Special Referee—Admissibility—Statute.

1. Under Section 837, L. O. L., providing that the testimony of resident witnesses under certain circumstances may be taken by deposition in an action at law or in a suit in equity, and Section 838, providing that if a witness is a nonresident or is not found in the state his testimony can only be taken in a suit in equity by a special referee who shall return the testimony taken to the court appointing him, and in view of Sections 1012, 165 and 166, defining a referee and a trial by a referee and relating to the filing of his report, the deposition of a nonresident witness taken in a suit in equity pursuant to a commission issued to a notary public in another

state and returned to the court was inadmissible in a suit in equity, because not taken by a special referee.

[As to proof of authority of person in foreign jurisdiction to take deposition, see note in Ann. Cas. 1914B, 161.]

Agriculture—Lien—Construction of Statute.

2. A statute such as Section 7439, L. O. L., creating a lien for the clearing and improvement of land, etc., is remedial, and should be liberally construed in favor of those for whose benefit it was enacted.

Agriculture—Lien—Clearing and Improving Land—Construction of Statute.

3. Under such interpretation a substantial compliance with its requirements is essential to the validity of the notice of lien, and in a suit for its foreclosure the plaintiff by his complaint must bring himself within the purview of the statute.

Agriculture—Lien—Clearing and Improving Land—Construction of Statute—"Ditching, Diking or Tiling"—"Diking"—"Clearing Land."

4. Under Section 7439, L. O. L., providing that anyone clearing or improving any land by ditching, diking or tiling at the request of the owner or the lawful possessor shall have a lien on the land for his wages and charges preferred to every other subsequent lien, mortgage or encumbrance, one plowing land and moving the earth so broken up into the low places and preparing the soil for cultivation and making a ditch and removing sagebrush was entitled to a lien, the words "by ditching, diking or tiling" expressing every kind of work necessary to convert parts of arid land, particularly sagebrush lands, into farms and orchards, and the word "diking" as applied to arid regions implying a leveling of the land, and the term "clearing land" as applied to arid regions covered with sagebrush meaning not only the removal or the destruction of the brush but the plowing or breaking up of the roots as well.

Agriculture—Lien—Clearing and Improving Land—Request of Owner or Lawful Possessor.

5. In such case, evidence *held* to show that the work done by plaintiff was performed at the request of the owner of the land or by the person in the lawful possession thereof.

Agriculture—Lien—Clearing or Improving Land—Owner or Possessor—Ratification.

6. In such case, although the owner did not originally contract with the plaintiff for or consent to the work in clearing the land, yet where by its agent it ratified and approved the work, it subjected the land to the lien.

Agriculture—Lien—Clearing and Improving Land—Lien Notice—Statute.

7. Under Section 7440, L. O. L., requiring a lien notice for improving and clearing land to be filed within 60 days after the completion of the work, when the labor required under the original contract was omitted, its final completion pursuant to such agreement dated from the time such omissions were supplied by the lien claim-

ant at the request of the owner, and a notice filed within 60 days after such completion was sufficient.

BURNETT, J., dissenting.

From Malheur: DALTON BIGGS, Judge.

In Banc.

This is a suit by T. H. Craig against the Crystal Realty Company, a corporation, and others, to foreclose two alleged liens for clearing and improving land. The plaintiff on January 20, 1915, filed with the county clerk of Malheur County, Oregon, a verified claim, addressed to the defendant H. Tyree and all other persons whom it might concern, substantially notifying them that a lien was asserted against the southeast quarter of the northwest quarter of section 25, township 16 south, range 47 east in that county, for work and labor performed between October 1, 1914, and November 23d of that year in clearing, improving, ditching and diking the described real property at the request of H. Tyree, who at all times mentioned in the notice, was the owner and in possession of the premises; that Tyree stipulated to pay him for making the improvement, a specified sum of money for each day's work with teams; that pursuant thereto the plaintiff's labor amounted to $423.50, on account of which he had received only $23.00, thereby leaving due him $400.50; and that 60 days had not elapsed since the last of such work had been performed.

The plaintiff on April 26, 1915, also filed another verified claim in the same manner, declaring a lien against the northeast quarter of the northwest quarter of the section, township and range mentioned in the preceding notice, for work done in clearing, improving, leveling and diking the real property, which labor was performed between August 7, 1914, and

March 25, 1915, at the request of Tyree who, at all times stated in the notice, was the owner and in possession of the premises; that the plaintiff was so employed by J. F. Carnifix, who was the agent and contractor of Tyree and was then authorized to secure the performance of the labor; that pursuant to the agreement the plaintiff worked with teams, which service at the price stipulated therefor amounted to $621.37, on account of which he had been paid only $232.90, thus leaving due him $388.47; and that 60 days have not elapsed since the last of such work was performed.

Each of these liens is set forth as a separate cause of suit in the complaint, which alleges the performance of such work, the preparing and filing of the notices of liens therefor, in which an expense of $6 was incurred in each instance; that the plaintiff was entitled to specified sums as attorney's fees, for foreclosing the liens; and that the defendants, H. Tyree, Roska E. Kitch, Helen M. Kitch, John R. Worley and Jane, his wife, A. M. Sloman, and G. W. Giesler and J. C. Giesler, partners as Giesler Brothers, had or claimed some interest in the lands so described, but that such assertion of right or estate was subordinate and inferior to plaintiff's liens.

A demurrer to each of the causes mentioned, on the ground that the complaint did not state facts sufficient, in either instance, to constitute a cause of suit, was overruled. Thereupon the defendants, the Crystal Realty Company, H. Tyree, Roska E. Kitch and Helen M. Kitch jointly answering, denied the material averments of the complaint, except that each claimed an interest in the lands. Predicated upon these issues the cause was tried and from the testimony received the court made findings of fact and gave a decree in

favor of the plaintiff as prayed for in the complaint, and the Crystal Realty Company alone appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Ralph W. Swagler.*

For respondent there was a brief over the name of *Messrs. Wood & McCulloch,* with an oral argument by *Mr. Wells W. Wood.*

MOORE, J.—1. Pursuant to a commission, issued by the clerk of Malheur County, Oregon, to John O. McClintock, a notary public at Meadville, Pennsylvania, he, on August 1, 1916, without any stipulation and in the absence of the plaintiff, his counsel, or other representative, took the depositions of the defendants, Roska E. Kitch, Helen M. Kitch and H. Tyree, and with his certificate such sworn statements were mailed to the clerk of the court which appointed him. The envelope, containing these papers, was opened by order of the court at the trial, April 19, 1917, and though an objection interposed by plaintiff's counsel to the reading of such sworn statements, on the ground that they had not been taken in the manner prescribed, was sustained and an exception allowed, the depositions were received in evidence under Section 405, L. O. L., and have been sent up with the transcript. It is contended by defendants' counsel that an error was committed in refusing to consider the testimony so taken and returned. The testimony of any witness residing or found in Oregon may be taken under certain circumstances, by depositions in an action at law or a suit in equity: Section 837, L. O. L. Where a witness resides out of or is not found within this state, however, his testimony can only be taken in a suit

in equity by a special referee, selected for that purpose, whose duty it is to return to the court appointing him the testimony so taken: Section 838, L. O. L.

In *Marks* v. *Crow,* 14 Or. 382 (13 Pac. 55), it was held that the statute then in force contained no provision for taking the deposition of a witness in a suit in equity, even *de bene esse,* unless a reference was made to find the facts. Since that decision was rendered the statute has been amended so as to authorize in some instances the submission of a cause to a referee, who is powerless to make any findings of fact in a suit in equity: *Anthony* v. *Hillsboro Gold Min. Co.,* 58 Or. 258 (113 Pac. 442, 114 Pac. 95); *In re Level,* 81 Or. 298 (159 Pac. 558).

"A referee is a person appointed by the court or a judicial officer with power * * to take and report the evidence in a suit in equity": Section 1012, L. O. L.

"Subject to the limitations and directions prescribed in the order of reference, the trial by referees shall be conducted in the same manner as a trial by the court": Section 165, L. O. L.

"The referees shall file with their report the evidence received upon the trial": Section 166, L. O. L.

It will thus be seen that the testimony of a witness who is not a resident of or found within Oregon can only be taken in a suit in equity by a special referee appointed for that purpose, whose duties, for the term of his selection are equivalent to those of the court which he thus represents. A trial by a referee in another state of a suit in equity pending in this state, does not authorize such appointee to take depositions to be used in Oregon, and no power is to be found in our statute for the appointment of a commissioner to take in another state depositions to be used in Oregon in a suit in equity.

An author in speaking of the sworn statements of a witness, received under such circumstances, remarks:

"A deposition taken irregularly, and not in conformity with the requirements of law, is inadmissible as testimony, and may be excluded on motion at the trial of the cause": Weeks, Depositions, § 366.

No error was committed in refusing to permit such sworn statements to be received in evidence, or in declining to consider the testimony so given.

2, 3. The plaintiff, referring to the work which he performed, as stated in the lien notice first filed, testified that he plowed the land there described and moved the earth so broken up into the low places; prepared the soil for cultivation and made a ditch across the west end of the tract; that he did clearing and ditching, the work of which at the price agreed upon amounted as stated in the first lien notice; that he had received payment on account thereof only as detailed, thereby leaving due the money so demanded; that he cleared the land described in the second notice of lien by removing the sagebrush then growing thereon; that he plowed and moved the earth as in the other tract, described in the first lien notice, and built along the west side of the north 40 acres a fill or dike from 6 to 26 inches high as a base for a ditch; that the work at the price specified amounted as stated in the second lien notice; that he had received on account thereof only the payments mentioned, and that there was due him the money thus undertaken to be recovered, together with the sum of $12, as expenses which had been incurred in preparing and filing the notices of lien and was entitled to other sums as attorney's fee.

It is contended by defendants' counsel that the principal work performed by the plaintiff consisted in leveling land, for which labor no lien is given. The

clause of the statute relied upon as conferring the right to resort to real property as security for labor performed in improving the premises, reads:

"Any and all person or persons who shall hereafter clear any land or improve the same by ditching, diking, or tiling the same, at the request of the owner or person in the lawful possession of the same, shall have a lien on the said land so improved or cleared for his wages and charges for the said service, which lien shall be preferred to every other lien, mortgage, or encumbrance of a subsequent date": Section 7439, L. O. L.

In *Pilz* v. *Killingsworth,* 20 Or. 432, 435 (26 Pac. 305), Mr. Justice BEAN says:

"The right to a lien is in derogation of the common law, and can only be established by a clear compliance with the requirements of the statute. The right is conferred by statute, and the party claiming such lien must show a substantial compliance with the statute, and by his complaint must bring himself within its provisions."

In *Nicolai Bros. Co.* v. *Van Fridagh,* 23 Or. 149, 150 (31 Pac. 288), the same justice further remarks:

"We have repeatedly held that while the act relating to mechanics' liens should be liberally construed, it is essential to the validity of a lien that the claim filed should on its face show a substantial compliance with the provisions of the law, and that none of the essential requirements of the statute can be dispensed with."

Based upon these excerpts it has been frequently stated that a statute creating a lien is in derogation of the common law, and like all other enactments detracting from such ancient rules, it should be strictly construed. It is believed, however, that our decisions upon this subject can all be harmonized by holding that a statute creating a lien is remedial in character

and should be liberally construed in favor of the persons for whose benefit it was enacted: *Ainslie & Co.* v. *Kohn,* 16 Or. 363, 371 (19 Pac. 97); *Willamette Steam Mills etc. Co.* v. *Shea,* 24 Or. 40, 53 (32 Pac. 759); *Sarchet* v. *Legg,* 60 Or. 213, 218 (118 Pac. 203). But when the statute is so interpreted, a substantial compliance with its requirements is essential to the validity of the notice of lien, and in a suit for its foreclosure, the plaintiff by his complaint must bring himself within the purview of such beneficent rendering of the provisions of the enactment: *Kezartee* v. *Marks & Co.,* 15 Or. 529, 535 (16 Pac. 407); *Pilz* v. *Killingsworth,* 20 Or. 432, 435 (26 Pac. 305); *Gordon* v. *Deal,* 23 Or. 153, 154 (31 Pac. 287); *Curtis* v. *Sestanovich,* 26 Or. 107, 115 (37 Pac. 67); *Coffey* v. *Smith,* 52 Or. 538, 540 (97 Pac. 1079).

4. Section 7439, L. O. L., was enacted and approved February 20, 1891 (Laws Or. 1891, p. 100), after the clearing and successful cultivation of sagebrush lands in Eastern Oregon had evolved from a state of experiment to a degree of certainty. Without the use of water to irrigate such lands when improved, crops sowed or planted thereon usually perish in the almost constant sunshine of that arid region. The clause of the statute which provides for clearing any land or improving it by ditching, diking or tiling was evidently enacted to facilitate, by the employment of or contract with laborers, the cultivation of sagebrush lands where the use of water for irrigation is essential to the production of valuable crops. The limiting words "by ditching, diking or tiling" were undoubtedly employed to embrace every kind of work necessary to convert parts of an arid plain into profitable farms and fruitful orchards. The statute having been evidently designed to apply, more particu-

larly, to sagebrush lands, the limiting words referred to should be so construed as to include every class of work and labor that might reasonably be embraced within the literal meaning of the terms so employed. The preparation of sloping surfaces for irrigation often requires, for the holding and diffusing of water, the making of small dikes or ridges to build which the earth must be removed from the higher places and used in forming small embankments, thereby necessitating a uniform leveling of the land. As the word "diking," when applied to the arid region of Oregon, means the raising of an embankment of earth, the use of that term in the statute necessarily implies a leveling of the land to accomplish which the person performing the work, at the request of the owner of the premises or of the person in the lawful possession thereof, is entitled to a lien for leveling real property for irrigation within a liberal construction of the enactment.

The phrase "clearing land" must have different significations in various localities. Thus in the timbered sections of Oregon the term referred to probably means the cutting and removal or destruction of timber and brush, thereby leaving in the earth the stumps and roots, while in the arid regions of this state, which part of Oregon is usually covered with sagebrush, the clearing of such land evidently means not only the removal or destruction of the brush but the plowing or breaking up of the roots as well. The plaintiff's testimony shows that the work which he performed was of that class for which liens are given.

5, 6. It is contended by defendants' counsel that the work so done by the plaintiff was not performed at the request of the owner of the real property or by the person in the lawful possession thereof. The defendant,

the Crystal Realty Company, a corporation, is the owner of the land upon which the liens are undertaken to be impressed. That owner could be in possession of the premises only by an agent, and could act only by such a representative. The testimony shows that the defendant Tyree, as agent for the owner of the land, had authority from his principal to bind it by the contract which he made with the plaintiff for the performance of the work set forth in the first lien.

The last lien filed, in referring to the plaintiff, contains clauses which read:

"That at the time said work and labor was performed by me as aforesaid, one H. Tyree was, and ever since has been, and now is, the owner and person in possession of said lands, and I was employed to perform said labor for T. Tyree by one J. F. Carnifix who was then and there the agent and contractor of the said H. Tyree and had authority from the said H. Tyree to employ me to perform said work and labor. * * That claimant was employed on the 4th day of August, 1914, by the said H. Tyree acting through his duly authorized agent, J. F. Carnifix, to clear, improve, level and dike the above described lands."

The plaintiff testified that two days after he began work on the land described in the second lien, Mr. Tyree visited the premises and directed him how to proceed, which commands were obeyed; that the improvement of the north 40-acre tract was so made under the supposition that Tyree was the owner of the real property; and though Mr. Carnifix originally requested the witness to do the work, he expected Tyree who instructed where and how the labor should be performed would pay therefor.

Although the owner of the land did not originally contract with the plaintiff for, or consent to the per-

formance of the work in improving the premises, the Crystal Realty Company, by its agent Tyree, ratified and approved the labor which was so performed, thereby subjecting the real property to the lien: 27 Cyc. 72.

We think there can be no doubt that the work described in the lien notices was performed at the request of the owner.

7. It is insisted that the second lien notice was not filed within 60 days after the completion of the work, as commanded by Section 7440, L. O. L. The testimony shows that the plaintiff commenced work on the north 40-acre tract August 7, 1914, and continued laboring on the premises until the ground froze so hard he was obliged to suspend operations; but that on March 25, 1915, he finished the work at the request of Tyree and within 60 days therefrom the second notice of lien was filed. When labor demanded by the terms of an original agreement has been omitted, the final completion of the work pursuant to the terms of the contract dates from the time such omissions are supplied by the lien claimant at the request of the owner: *Avery* v. *Butler,* 30 Or. 287, 292 (47 Pac. 706). That the work required to complete the improvement of the north 40 acres of the land was not considered finished January 20, 1915, when the first lien was filed and within 60 days from the time in which the ground froze, is seemingly evidenced from the fact that the second lien notice was not then given.

A consideration of the entire testimony convinces us that the work performed in March, 1915, was done at Tyree's suggestion to complete the contract and not to extend the time for filing the lien.

It follows that the decree is affirmed. AFFIRMED.

BURNETT, J., Dissenting.—I dissent from the conclusion of Mr. Justice Moore in this case sustaining the liens mentioned in his opinion, because the testimony does not show that the work relied upon to uphold them was done "at the request of the owner or person in lawful possession" of the land within the meaning of the statute, and because the plowing and grading or "leveling" is neither clearing nor "ditching, diking or tiling," the only things mentioned in the act for which a lien upon the realty is allowed.

Reversed and decree rendered February 5, rehearing denied May 28, 1918.

(For former opinion, see 87 Or. 423.)

FIRST NAT. BANK *v.* MULTNOMAH STATE BANK.

(173 Pac. 462.)

From Multnomah: George N. Davis, Judge.

Department 2.

On petition for rehearing. Denied.

Mr. Charles A. Johns and *Mr. Sidney J. Graham,* for the petition.

Messrs. Carey & Kerr and *Mr. Omar C. Spencer, contra.*

McCAMANT, J.—In a closely reasoned petition for a rehearing counsel for defendant argues that the act of 1913 is applicable to Multnomah State Bank although this corporation was organized April 1, 1911. It is true, as contended, that there is a distinction be-

tween a statute imposing a new personal liability on a stockholder and one authorizing assessments on stock enforceable only by sale of the stock. The rule sustained by the weight of authority makes statutes of the latter type inapplicable to corporations organized prior to their enactment.

In 1 Cook on Corporations (7 ed.), Section 242, page 689, it is said:

"A statute which authorizes an additional assessment upon existing paid-up stock is unconstitutional."

In 4 Thompson on Corporations (2 ed.), Section 4816, the author says:

"It may be laid down as a rule that a statute authorizing assessments to be made on existing full paid stock in unconstitutional and void as to existing stockholders."

In 2 Clark and Marshall on Corporations, 404, the rule is stated thus:

"When neither the statutes of the state nor the charter or articles of association of a corporation, at the time persons become stockholders or members thereof, permit the corporation to levy assessments upon them over and above the amount of their shares or the amount agreed to be paid, as the case may be, the legislature cannot afterwards confer the power to levy such assessments, as against a dissenting stockholder or member, unless the power to alter, amend or repeal the charter has been reserved, for such a statute would be unconstitutional as impairing the obligation of his contract with the corporation."

In 1 Purdy's Beach on Private Corporations, 174, it is said:

"A statute authorizing additional assessment on paid-up stock is unconstitutional."

In *Enterprise Ditch Co.* v. *Moffitt,* 58 Neb. 642 (79 N. W. 560, 76 Am. St. Rep. 122, 45 L. R. A. 647, 654), Mr. Chief Justice Harrison says:

"The paid share or shares of stock were the personal property of any individual owner, and a contract which embodied the articles of incorporation and the pertinent laws of the State existed to which the shareholder was a party. * * The legislature could not so change these accrued, contractual and property rights as to allow an assessment against the paid-up stock, and its forfeiture or sale for the nonpayment. This would involve too violent an invasion of property and contract rights."

These principles are also sustained by the well-reasoned opinion of Mr. Justice Straup in *Garey* v. *St. Joe Mining Co.,* 32 Utah, 497 (91 Pac. 369, 12 L. R. A. (N. S.) 554). Defendant relies largely on *Corbin Banking Co.* v. *Mitchell,* 141 Ky. 172 (132 S. W. 426, 31 L. R. A. (N. S.) 446), and *Wall* v. *Basin Mining Co.,* 16 Idaho, 313 (101 Pac. 733, 22 L. R. A. (N. S.) 1013). In neither of these cases were the assessments based on statutes enacted subsequent to the incorporation of the companies on whose stock the assessments were levied. In the Idaho case the statute was enacted in 1891 and it is inferable from the opinion that the corporation was organized in 1903.

At the date of this assessment it is probable that this stock had little or no value, but whether it was worth much, little or nothing, it belonged to Rostad and plaintiff held it in pledge. These parties could not be deprived of their property through an assessment authorized only by the act of 1913. The corporation was organized in 1911 and the contract rights of stockholders with the corporation were fixed by the law as it stood at that time. These rights could not be impaired by a later statute.

We are satisfied of the soundness of the former opinion and the petition for a rehearing is denied.

REVERSED AND DECREE RENDERED.

REHEARING DENIED.

McBRIDE, C. J., and MOORE and BEAN, JJ., concur.

Argued at Pendleton May 7, appeal dismissed May 28, 1918.

SEAWEARD v. MALHEUR DRAINAGE DIST.

(173 Pac. 462.)

Appeal and Error—Record—Drainage Establishment Proceeding.

1. Under drainage district law, allowing appeal from County Court to Circuit Court to be taken in the same manner as appeal in an equity case, and Section 556, L. O. L., providing that on appeal from a decree given in any court, suit shall be tried anew on the transcript and evidence accompanying it, appeal from Circuit Court, which dismissed appeal from County Court, which overruled objections to assessment of benefits in proceeding for establishment of a drainage district, will be dismissed, the record not showing the original petition or notice, constituting the process, nor any testimony on the issues, so that it is impossible to give any intelligent attention to appellant's complaint.

From Malheur: DALTON BIGGS, Judge.

In Banc.

From statements in the briefs it seems that the matter under consideration arose in a proceeding for the formation of a drainage district in Malheur County under Chapter 340 of the Laws of 1915. Only a fragment of the record appears in the transcript or abstract, as follows:

"Now on this 25th day of April, A. D. 1917.

"J. H. SEAWEARD.

"It is therefore ORDERED, ADJUDGED AND DECREED that the Objections and Exceptions of J. H. Seaweard

as to the assessment of benefits to SE. ¼ NW. ¼, W. ½ NE. ¼ SW. ¼ Sec. 8, Twp. 18 S. R. 47 E. W. M., be and the same are hereby overruled and the assessment of the benefits and damages thereto as assessed by the commissioners is approved and in all respects confirmed and same is hereby made a lien on the said land all as hereinafter more specifically shown in the tabulated list of assessments and levies."

This was the extent of the record upon appeal from the County Court to the Circuit Court, and the latter tribunal dismissed the appeal, from which decision J. H. Seaweard has appealed to this court. The same question is presented for our determination.

APPEAL DISMISSED.

For appellant there was a brief and an oral argument by *Mr. C. McGonagill.*

For respondent there was a brief over the name of *Messrs. McCulloch & Wood,* with an oral argument by *Mr. Wells W. Wood.*

BURNETT, J.—1. The foundation of any judgment or decree is in the pleadings and other papers giving jurisdiction to the court rendering the decision and in equity cases on appeal these must be accompanied by the testimony taken in the court of original jurisdiction. Without knowledge of the fundamentals, we are unable to determine the validity of the superstructure embodied in the decree. In the drainage district law it is provided that an appeal may be taken from the decision of the County Court to the Circuit Court in the same manner as appeals are taken in equity cases, as by law provided. After reference to appeals from judgments it is said in Section 556, L. O. L.:

"And upon an appeal from a decree given in any court the suit shall be tried anew upon the transcript and evidence accompanying it."

There is nothing in the record before us showing the original petition or the notice serving the office of process, nor any testimony whatever upon the issues involved. It is impossible from these data to give any intelligent attention to the plaint of the appellant. The appeal must therefore be dismissed.

APPEAL DISMISSED.

Argued April 11, reversed and remanded April 30, rehearing denied June 4, 1918.

HAINES v. FIRST NAT. BANK OF ROSEBURG.

(172 Pac. 505.)

Evidence—Letters and Circulars.

1. A depositor suing a bank for an alleged balance may not introduce a printed circular mailed to him, announcing defendant's consolidation with the D. bank, or letter on letter-head of the D. bank signed by its president, making such announcement and stating continuance in the business of defendant's former president; it not being shown that D.'s president was agent of or authorized to speak for defendant, or that the circular was mailed by its authority.

Trial—Instructions—Conformity to Evidence.

2. An instruction framed on a theory of facts of which there is no evidence is properly refused.

Principal and Agent—Creation of Relation.

3. Merely because a national bank cannot act as broker for loaning for a depositor, money which it has on deposit, arrangement by him with its president that it should do so does not make the president as an individual his agent.

Principal and Agent—Authority to Loan.

4. Authority to agent to loan money does not authorize him to borrow the money for himself.

[As to general rules respecting authority of agent, see note in 16 Am. St. Rep. 493.]

Principal and Agent—Ratification—Knowledge.

5. Ratification of an agent's act, in exceeding his authority to loan by borrowing the money for himself, cannot be imputed to the prin-

cipal merely because he was told that a loan was made, without being informed of the facts.

Account Stated—Impeachment.

6. One to whom a statement of account was rendered, though having made no objection, may impeach it for fraudulent concealment of facts.

Banks and Banking—Withdrawal of Deposit—Evidence.

7. Statement by a depositor in a bank that he had loaned his money to its president is competent evidence for the bank that he had withdrawn his money from the bank.

Banks and Banking—Liability of Bank—Acts of President as Individual.

8. The president of a bank may as an individual borrow money for his private account from a depositor in the bank; dealing with one who is president of a bank not necessarily making his acts those of the bank.

Limitation of Actions—Action by Bank Depositor.

9. The statute of limitations does not begin to run against claim of a depositor in a bank till his demand has been refused.

From Douglas: JAMES W. HAMILTON, Judge.

Department 1.

The plaintiff grounds his cause of action on the statement, in substance, that on April 6, 1908, he had on deposit in the defendant bank $2,221.71, since which time the defendant has paid to him $221.71, and no more, leaving a balance of $2,000 which has not been paid by the defendant, although the plaintiff has demanded the same.

Among other things, the answer contains this language:

"Denies that the plaintiff withdrew from said bank on the 6th day of April, 1908, and since that date, the sum of $221.71 only, but alleges the fact to be that the plaintiff on said 6th day of April, 1908, withdrew from said bank the sum of $2,000 and thereafter continued as a depositor and patron of said bank, withdrawing and depositing different sums of money; that all of the sums of money so deposited by the plaintiff have been withdrawn by him."

This allegation was traversed by the reply.

For further answer the defendant avers in substance that about April 6, 1908, at the special instance and request of the plaintiff, T. R. Sheridan, then president of the defendant bank, loaned to R. S. Sheridan for the plaintiff $2,000, and for the purpose of effecting the loan withdrew that amount of money from the plaintiff's deposit with the defendant bank, that being the identical sum demanded herein.

Again, in substance, the defendant answers to the effect that the sum of $2,000 of the plaintiff's money was withdrawn from his account by T. R. Sheridan and loaned for the plaintiff; that on or about April 6, 1908, the bank rendered and stated an account between the plaintiff and the defendant which showed the withdrawal of the $2,000 in question, with a balance remaining due the plaintiff in the sum of $221.71, and that the plaintiff never made any objection to, but always acquiesced in, the correctness of that account. Finally, the transaction is again rehearsed in substantially the same language, including a statement of the account showing the withdrawal of $2,000 on April 6, 1908, and that the plaintiff received the account so stated, retained the same, acquiesced in and approved the same, and that more than six years have elapsed since the withdrawal of the sum of $2,000, on account of all of which the defendant urges that the demand of the plaintiff has been barred by the statute of limitations.

For affirmative matter in the reply the plaintiff alleges, in effect, that T. R. Sheridan, as president of the bank, represented to him that his funds could be loaned by the bank on interest; that while plaintiff did not authorize either the bank or its president to loan any

of his money, it did render him the statement of account showing that $2,000 was charged against the plaintiff which Sheridan, acting on behalf of the defendant, as its president and actual manager, represented to plaintiff was a loan on his account upon which he would draw interest, and that his money was subject to withdrawal from the bank by him at any time; that on belief of the plaintiff that the bank was solvent, and having full confidence in the integrity of Sheridan, he made no objections to the account; that on the contrary, as the event proved, the bank never did loan the money, but that Sheridan, its president, took that amount for his own use without plaintiff's authority and caused the same to be charged to the account of the latter, using his position as president of the bank for that purpose.

The essence of the new matter in the reply is that the representations of the defendant's president to the effect that the bank had loaned the money were designed to deceive and did deceive the plaintiff causing him apparently to acquiesce in the account stated; but that in fact the statements of the defendant's president and manager were false and were uttered for the purpose of concealing his personal appropriation of the plaintiff's funds and so the latter, relying upon the same, was defrauded. A jury trial resulted in a verdict and judgment for the plaintiff and the defendant appeals. REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. Oliver P. Coshow.*

For respondent there was a brief and an oral argument by *Mr. B. L. Eddy.*

BURNETT, J.—The record contains many assignments of error, some of which we find it unnecessary to consider. Having testified, admitting that he had received the statement of account mentioned and that he had not made objection to it, the plaintiff introduced in evidence a printed circular of date June 17, 1911, announcing the consolidation of the defendant bank with the Douglas National Bank and the purpose to carry on banking business under the name of and in the rooms of the Douglas National Bank. The plaintiff testified that he had received this through the mail, but nothing appeared in evidence about who sent it or by whose authority it was issued. He also introduced a letter dated August 9, 1911, on the letter-head of the Douglas National Bank and signed by J. H. Booth, president. It is addressed to the plaintiff and aside from mere formal expressions reads thus:

"We have forwarded check books of this bank to you as requested in your favor of the 7th and thank you for your expressions of continuing your business with the consolidated bank as formerly done with the First National. We appreciate it and we assure you that we shall always be ready to care for your wants as called upon and shall extend just the same courteous treatment as given in times past by the other bank which we have now absorbed. Mr. Sheridan continues right along actively with us as he did in the other bank but he wants some of us younger men to take the burden of the work from him a large share of which the writer will undertake."

1. The defendant objected to the introduction of both these documents on the ground that they were incompetent, immaterial, irrelevant and in no way affecting the issues involved in this action, which objection was overruled and the instruments were read in evidence over the exception of the defendant. There was no tes-

timony tending to show that the defendant sanctioned either of the papers in question. So far as the allusion to Sheridan's continuing in the banking business with the Douglas National Bank is concerned, it was pure hearsay and not admissible. In order to charge the defendant with any of the statements contained in those documents or the deductions to be drawn therefrom, it would be necessary to show that they were authorized by the defendant. In principle it is like the Goodhart letter alluded to in nearly all the cases against the defendant, cited at the close of this opinion. Goodhart was a national bank examiner and in auditing the books and accounts of the defendant in his official capacity he found entries where the president of the bank had drawn memorandum checks against the accounts of depositors diminishing their deposits by so much, even as in the present case. In such instances he addressed a letter to the depositor stating that such memorandum checks of the president had been honored and the amount charged to the account of the depositor and called upon the latter to state whether he authorized or approved the action thus narrated. In some of those cases the depositor answered avowing the action of Sheridan in so doing and attempts were made to predicate estoppels upon the correspondence; but, as held in *Doerstler* v. *First National Bank of Roseburg,* 82 Or. 92 (161 Pac. 386), the bank examiner was in no sense the agent or authorized to speak for the defendant and, hence, no estoppel could be grounded upon his letter and the answer thereto. So, here, it is not shown that the president of the Douglas National Bank was the agent of or had authority to speak for the defendant. Neither does it appear that by its authority the printed circular was mailed to the plaintiff; and hence by a parity of reasoning, as employed

with reference to the Goodhart letters, it was error to receive in evidence the letter and circular here involved.

2. The defendant requested a variety of instructions too numerous and lengthy to be quoted at large in this opinion. One element apparent in them is that they were framed upon the theory that Sheridan withdrew the money and loaned it for the plaintiff; but although this is alleged there is nothing in evidence even tending to show that T. R. Sheridan loaned the money to anybody. In this state of the testimony an instruction involving that feature was properly refused.

3. Again, another element of the denied instructions is to the effect that Sheridan acted as agent for the plaintiff; but it leaves out of view the necessary ingredient that his agency must have been with the plaintiff's previous consent or subsequent ratification with knowledge of all the facts pertaining to his action. Of course, as stated in the Doerstler case, if, indeed, the plaintiff appointed Sheridan individually to be his agent to draw the money out of the bank for any purpose whatsoever and, acting under such authority Sheridan had taken out the money, the bank would not be responsible for the same. The argument of the defendant in the present juncture is that the plaintiff must be charged with a knowledge of the law that no national bank can act as broker or agent for another person in loaning money which it has on deposit, and that being so legally informed, he must be held to have dealt with Sheridan as an individual. It does not follow, however, that because Sheridan could not as a matter of law commit his bank to an agency for the plaintiff for any purpose of the kind mentioned, negotiations to that end would constitute an appointment of Sheridan the individual to be such agent.

Under the circumstances no legitimate result in favor of the bank could grow out of an attempted illegal transaction such as would result if the bank undertook to act as the broker for the purpose of effecting a loan for anyone. However contrary to the law it would be to arrange for the bank to loan money for the plaintiff the scheme cannot be pruned of its illegality without his consent so as to make Sheridan, the individual, an agent for him.

4. As stated, there is no evidence in the record that Sheridan loaned any of the money. On the contrary the construction most favorable to the defendant is that he borrowed it. Indeed, there is the testimony of two witnesses who declare that the plaintiff told them that he had loaned his money to Sheridan. Then, too, even if he was appointed by the plaintiff to be the agent of the latter to loan the money it would not be authority to Sheridan to borrow the money for himself. The reason is that an agent cannot assume a position where he is at once acting for himself and adversely to his principal. His duty to his principal in such a case would require him to act as lender and he could not at the same time act as borrower, for the two relations are inconsistent with each other. True it is, that if the principal was aware of all the facts it would be competent for him to ratify the transaction. But the evidence is all one way that the plaintiff had no knowledge that Sheridan himself had taken the money for his own purposes until about the time he commenced this action.

5, 6. Among the refused instructions was one containing this language:

"If you find from the evidence that the defendant bank rendered to the plaintiff a statement of account

and if you find that said statement credited the plaintiff's account with a certain sum of money as interest on said loan, and if you find that the plaintiff with knowledge of said loan retained said interest, then I instruct you that the plaintiff cannot now repudiate the said loan and at the same time retain the benefit of said loan, and if you find that plaintiff has retained such interest, I instruct you that the plaintiff's conduct would constitute a ratification of said loan and plaintiff cannot recover in such action."

This instruction omits the necessary element of knowledge of all the facts upon which the account was predicated. On the theory that Sheridan, the individual, was indeed the agent of the plaintiff, the mere statement that a loan had been made, when, in fact, unknown to the plaintiff Sheridan had borrowed the money, would not be sufficient to impute ratification to the plaintiff. He had a right to presume that Sheridan had indeed loaned the money to somebody instead of borrowing it himself and he would have a right to impeach the stated account by reason of the fraud of Sheridan in stealthily exceeding his authority as agent.

7. The defendant excepted to an instruction given by the court in which the following language was used:

"There is no evidence here before you which would permit you to find under the issues and the evidence in this case that the money was loaned either to T. R. Sheridan or R. S. Sheridan, and the defendant cannot be excused from the payment of the amount of the deposit of the plaintiff on account of a loan either to T. R. or R. S. Sheridan."

As before pointed out, there was the testimony of two witnesses to the effect that the plaintiff had told them he had loaned his money to Sheridan. This was competent testimony in support of the averment in the answer that the plaintiff on April 6, 1908, with-

drew the sum of $2,000 from the bank and that all sums of money deposited by him had been withdrawn by him. If, in truth, he loaned the money to Sheridan, as these witnesses state, and which he denies indeed, the jury would be authorized to find that he had withdrawn it from the bank. He could not well loan that money to anyone without withdrawing it from his bank account.

8. Again, in an instruction the court stated this:

"As to the transaction between the plaintiff and the defendant bank, I instruct you that the acts of the president of the defendant bank are to be deemed the acts of the bank itself."

This is a mandatory sanction of the plaintiff's theory notwithstanding the testimony about his admissions that he had loaned the money to Sheridan. There is no law against Sheridan, the individual, borrowing money from the plaintiff with his consent and for the private account of the former, and there is nothing to prevent the plaintiff from loaning Sheridan the money without necessarily making the transaction an act of the bank. It does not unavoidably follow as a matter of law that dealing with a man who happens to be the president of a bank makes his acts those of the bank. There are two sides to this question, dependent upon whether the plaintiff was dealing with the bank through its president, as he now claims, or whether he dealt with him as an individual and loaned the money to him in his private capacity as the two witnesses testify he related to them.

9. The court instructed the jury thus:

"If you find that the plaintiff has a claim against the defendant and that defendant bank gave plaintiff credit on account of any payment of interest, then six years would have to elapse from the said payment be-

fore plaintiff's claim can be barred by the statute of limitations, even though the statute of limitations would begin to run against the plaintiff prior to his demanding payment of claim he had against the defendant."

It is not clear what a credit of interest on the deposit would have to do with tolling the statute of limitations under conditions disclosed by the record. It does not begin to operate against one who deposits money in a bank until his demand for the same has been refused. It is common knowledge that individuals leave money on deposit in banks for long periods of time beyond the six years prescribed in which an action for money may be instituted; yet no one would pretend that the statute of limitations had barred a claim for a deposit unless a demand for the same had been refused and the period had afterwards expired. The instruction in that respect is harmless for it does not disturb the principle that a demand must be shown before the statute begins to run.

In brief, it was error to admit in evidence the circular and the Booth letter because it was not shown that they were authorized by the defendant. Neither would they excuse the plaintiff from his duty either to avow or reject the account provided he had knowledge of the facts upon which it was based. It was error to state to the jury as a matter of law that the transactions between Sheridan and the plaintiff were necessarily binding upon the bank, because it omits the possibility that the plaintiff dealt with Sheridan as an individual, of which there was some evidence. It is elementary that where there is testimony supporting the theory of either party it is incumbent upon the court to leave the question to the jury under proper instructions and a charge which ignores such a situ-

ation and directs attention only to the theory of one party under such circumstances is erroneous.

The principal questions involved in this appeal have been settled in the cases of *Chapman* v. *First Nat. Bank,* 72 Or. 492 (143 Pac. 630, L. R. A. 1917F, 300); *Byron* v. *First Nat. Bank,* 75 Or. 296 (146 Pac. 516); *De War* v. *First Nat. Bank,* 80 Or. 260 (156 Pac. 1038); *Wells* v. *First Nat. Bank,* 80 Or. 329 (157 Pac. 145); *Carlon* v. *First Nat. Bank,* 80 Or. 539 (157 Pac. 809); *Verrell* v. *First Nat. Bank,* 80 Or. 550 (157 Pac. 813).

The conclusion is that the judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED. REHEARING DENIED.

McBRIDE, C. J., BENSON and HARRIS, JJ., concur.

Argued December 14, 1917, reversed January 22, rehearing allowed April 9, argued on rehearing April 26, decree reversing Circuit Court adhered to June 4, 1918.

MARSHALL *v.* GUSTIN.

(170 Pac. 312; 173 Pac. 461.)

Appeal and Error—Matters Reviewable—Demurrer—Grounds.

1. A demurrer on grounds other than the running of limitations does not raise such question on appeal.

Cancellation of Instruments—Demurrer—Equitable Jurisdiction.

2. Where it appears inferentially that defendant was holding land as a guardian when she fraudulently prevailed upon plaintiffs to sell to her at an inadequate price, a complaint was not demurrable as not calling for equitable jurisdiction, although the court might not be able to grant the specific relief prayed for.

Guardian and Ward—Recovery of Property—Equity or Law—Inconsistent Remedies.

3. Where defendant was appointed guardian of plaintiffs and of personal property in Oregon, but not in Washington as to land there, and she purchased such land from them fraudulently at an inadequate price, equity had no jurisdiction of an action for the difference between the price received and the value of the land, it being necessary in such case that plaintiffs either affirm the transaction and sue

for damages or repudiate the bargain and call upon equity to place them *in statu quo*, but both remedies cannot be had in one action.

[Powers of guardian in chancery and at common law, see note in 18 Am. Dec. 689.]

ON REHEARING.

Infants—Sale of Land—Fraud of Purchaser—Remedy.

4. Remedy of infants induced by fraud to sell their land for less than its value, they, on arriving at majority, choosing to affirm the sale, and not asking to have it set aside, is only at law for damages; there being nothing calling for an investigation that a jury cannot readily make.

BEAN, J., dissenting.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

This is a suit in equity. The substance of the complaint is that the plaintiffs were two of the eight children of C. A. Marshall, who died intestate, November 20, 1905, leaving to his heirs among other property seventy-five acres of land in Clarke County, Washington; that the defendant, who is a sister of decedent, was the duly appointed guardian of the persons and estates of the minor heirs, including plaintiffs, and taking advantage of their youth and inexperience wrongfully and falsely represented to plaintiff George A. Marshall that his undivided one eighth of the land was worth not to exceed $170, when in truth it was worth $1,000, and by reason of such false representation obtained from him a deed thereto for the consideration of $170; that in like manner she secured from Lavina A. Marshall a deed for his undivided one eighth of the land for a consideration of $68. The pleading contains further allegations to the effect that plaintiffs placed confidence in the statements of their aunt and guardian and relied thereon and suffered loss thereby; that immediately after securing the second deed she sold the property for a price in excess of $8,000—receiving in payment some cash, and some promissory notes secured by a mortgage on the land,

for a balance of $6,412.50, which notes and mortgage are still owned by and in the possession of defendant. It is further alleged that plaintiffs did not discover and could not by the exercise of reasonable diligence have discovered the fraud which had been perpetrated until a short time before the commencement of the suit. The prayer of the complaint is as follows:

"1. That the said defendant be required to account to the said plaintiffs for the difference between the true value of their interests in the land so conveyed, and the amounts paid to them by her at the time of their conveyance to her.

"2. That said defendant be held to be a trustee for the said plaintiffs, of their interests in the profits made by her in the sale of the said lands.

"3. That the said notes given in part payment of the purchase price in the sale of the said lands be impressed with a trust to the extent of the plaintiffs' interest therein, and that the said notes be sold to satisfy the amounts due to the said plaintiffs, and for such other and further relief as to the court may appear just and equitable, and for the costs and disbursements of this suit."

Defendant demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of suit, and the further ground "that it appears upon the face of the complaint that the court has no jurisdiction of the subject matter of the suit." The demurrer having been overruled the defendant answered with some admissions and denials, and affirmatively pleaded certain counterclaims to which a reply was filed and a trial had, which resulted in a decree in favor of plaintiffs in the following form:

"Now, therefore, by reason of the premises and of the aforesaid findings of fact and conclusions of law, it is considered, adjudged and decreed, that the plaintiff, George Amos Marshall, do have and recover of

and from the defendant, Nellie Gustin, the sum of Six Hundred Twenty and 85/100 ($620.85) Dollars, with interest thereon at the rate of six per cent per annum from October 11th, 1911; and it is further ordered that the plaintiff, Lavina A. Marshall, do also have and recover of and from the said defendant, Nellie Gustin, the full sum of Five Hundred Seventy ($570.00) Dollars, with interest thereon at the rate of 6% per annum from October 11th, 1911; and it is further ordered, that the plaintiffs have and recover of and from the defendants their costs and disbursements, taxed at $——."

REVERSED. SUIT DISMISSED.

For appellants there was a brief over the names of *Mr. Henry J. Westbrook* and *Messrs. Christopherson & Matthews,* with oral arguments by *Mr. Q. L. Matthews* and *Mr. Westbrook.*

For respondents there was a brief over the names of *Mr. Edward J. Brazell* and *Mr. Martin W. Hawkins,* with an oral argument by *Mr. Brazell.*

BENSON, J.—Defendant urges that the demurrer should have been sustained upon two grounds: (1) That it appears upon the face of the complaint that the statute of limitations has run against the claims of both plaintiffs; and (2) that the facts alleged do not disclose a case calling for the interposition of a court of equity.

1. As to the first of these, it is sufficient to say that no demurrer was interposed upon that ground, and it cannot now be considered: *Portland* v. *Coffey,* 67 Or. 507 (135 Pac. 358).

2. As to the second contention it may be remarked that from the complaint it appears, at least inferentially, that the defendant was holding the real estate described therein as guardian of plaintiffs at the time

of the transfer of the land to her. Such a trust relation existing between the parties creates a condition calling for the exercise of equitable jurisdiction and although the court might not be able to grant the specific relief prayed for, it would be justified in following the trust property or its proceeds for the relief of the *cestui que* trust. We must therefore hold that the complaint is not vulnerable to a demurrer upon this ground.

3. A careful examination of the evidence discloses the following facts: The father of plaintiffs died, leaving an estate consisting of seventy-five acres of land in Clarke County, Washington, and a life insurance policy in Portland, upon which was collected the sum of $1,904.85. The County Court of Multnomah County appointed defendant guardian of the minor children, including plaintiffs, and of the personal estate just referred to. The estate in Washington was administered, but there is no evidence that any guardian or trustee was ever appointed to manage it. There is no question as to the integrity and propriety of defendant's care of the children and of the funds which came into her hands as guardian. On September 18, 1909, plaintiff George Amos Marshall conveyed his one-eighth interest in the land to defendant, and in September, 1911, Lavina Marshall conveyed his one-eighth interest to defendant, the expressed consideration in the deeds being $170 and $68 respectively. Each of the plaintiffs was twenty years old when he made his conveyance. Thereafter, having acquired by purchase the interests of the other heirs, defendant sold the land in connection with an adjacent 160 acre tract of which she was the owner, for the expressed consideration of $8,812.50, receiving a partial payment in cash and, for the balance, accepting two notes for the aggre-

gate sum of $6,412.50, secured by a mortgage upon the land. The testimony is very largely directed to the relative values of the 75 acre tract and the 160 acre tract which were sold as one at the rate of $37.50 per acre. It is not necessary to consider this evidence since under the pleadings and the facts already stated it sufficiently appears that the plaintiffs have not made a case calling for the interposition of a court of equity. It is true that the prayer asks that the defendant be declared a trustee of their interests in the profits arising from the sale of the land by defendant, but they can have no interest in such profits unless they were part owners of the land at the time of such sale, which, according to their allegations, they were not. It must be remembered that they are not seeking a rescission of their contracts, or a cancellation of their deeds, but simply to recover the difference between the price received by them and the true value of the property and for this relief they have a complete remedy at law. When a party has been induced by fraud and deceit to part with his property for an inadequate consideration he has his election of two remedies: He may affirm the transaction and have his action for damages, or he may repudiate the bargain and call upon a court of equity to aid him in placing the parties in the position they occupied before the deal was consummated, but he cannot have both remedies.

It is evident from the decree itself that the trial court found no ground for equitable interference, since a money judgment is all that was allowed and, in that event, the money judgment could not under any view of the matter be sustained. In the case of *Oregon-Wash. R. & N. Co.* v. *Reed*, decided December 27, 1917, not yet reported, this court through Mr. Justice MOORE says:

"This being so, the element of damages which the defendants may have sustained is necessarily eliminated, for the right to recover such compensation in a suit must depend upon some equity which enables the court to secure and retain jurisdiction of the subject matter, and as an incident thereof to award the damages inflicted."

In *Zinn* v. *Zinn,* 54 W. Va. 483 (46 S. E. 202), the same doctrine is thus expressed:

"All that plaintiff has any claim to whatever is the oil royalties and gas rentals reserved in the lease of Preston G. Zinn, and all he claims by his bill is these oil royalties. This is mere pecuniary demand for the royalties already received by plaintiff and is not maintainable under the alleged heads of equitable jurisdiction."

We do not wish to be understood as holding that in a proper case a court of equity will not exert its power where a trustee has violated the conditions of his trust or has acted in bad faith in the execution thereof. However, when the facts proven and the relief sought justify nothing further than pecuniary recompense for the wrong, there is nothing upon which equitable jurisdiction can base its action.

The decree must be reversed and one entered here dismissing the suit, without prejudice.

REVERSED. SUIT DISMISSED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

BEAN, J., Dissenting.—I am unable to concur in the holding that this is not a proper case for the interposition of a court of equity.

As stated, it appears that the defendant, Nellie Gustin, was appointed as guardian of the persons and

estates of plaintiffs, George Amos Marshall and Lavina A. Marshall, minor children of C. A. Marshall. Part of their estate consisted of a one-eighth interest each in 75 acres of land. While they were yet minors the defendant purchased the interest of each in the land for the consideration of $68 and $170 respectively. In December, 1911, the defendant sold the 75-acre tract together with 160 acres of adjoining land which she owned and which was of but little value, for $8,812.50. It is alleged that the one-eighth interest of each of the plaintiffs was of the value of $1,000. This suit was instituted for an accounting and to impress a trust upon the proceeds of the land in favor of the plaintiffs for the difference between the respective amounts paid and the actual value of their interest in the land. After deducting some expenditures made by the guardian on behalf of her wards the trial court adjudged a balance of $620.85 in favor of George Amos Marshall, and a balance of $570 in favor of Lavina A. Marshall.

Equity has inherent, original, general jurisdiction independent of statutory legislation concerning the same subject matters over the persons and estates of infants: 3 Pom. Eq. Juris. (3 ed.), § 1303. In 1 Pom. Eq. Juris. (3 ed.), § 78, we find the following:

"Under their general power in cases of trust and of accounting, the American courts of equity may give all proper relief to wards against their guardians."

Constructive fraud which is inferred from the conditions and relations of the parties to the transaction embraces those cases in which the transaction, although it may be perfectly regular in its external form, is impeachable in equity because it lacks that absolute consent which is regarded as essential by

courts of equity: 2 Pom. Eq. Juris., § 943. In a note to this section we find a quotation by Mr. Justice HAND in *Cowee* v. *Cornell,* 75 N. Y. 91, 99 (31 Am. Rep. 428), as follows:

"It may be stated as universally true that fraud vitiates all contracts, but as a general thing it is not presumed, but must be proved. Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood. This doctrine is well settled."

Such constructive fraud includes: (1) Transactions void or voidable with persons totally or partially incapacitated; (2) transactions presumptively invalid between persons in fiduciary relations. The incapacities embraced under the first head may be created by the policy of the law, such as infancy, and may be either total or partial. They may be inherent in the very position and circumstances of the parties: 2 Pom. Eq. Juris. (3 ed.), § 944. The incapacity of the plaintiffs while they were minors to enter into a binding contract and execute a conveyance of their land to the defendant is the same in equity as in law. Such contracts are generally voidable only and therefore may be ratified after the infants attain their majority: Id., § 945.

In the present case the land having been conveyed by the infants' guardian to one who is presumably an innocent purchaser for value, and the former wards of defendant having ratified the deed so far as the title is concerned by this suit seek to compel the guardian to account for, and to have a trust impressed upon, the proceeds of the land, namely, certain promissory notes in the hands of the defendant, in lieu of the land to which they would have an undoubted equitable right if the second conveyance had not been executed.

The defendant should in equity be declared to hold a fair proportion of the proceeds of the land in trust for plaintiffs and the trust should be enforced. Their remedy at law would not be adequate. Mr. Pomeroy says:

"Equity * * under certain circumstances grants remedies which are legal in their nature, and are capable of being conferred by a judgment at law, namely, a mere recovery of money, or of the possession of specific land or chattels": 1 Pom. Eq. Juris. (3 ed.), § 108.

A purchase made by a guardian from his ward, or by a trustee of the *cestui que trust,* or by an attorney of his client, may be in good faith, and as beneficial to all parties as any other transactions in life; and yet the inconvenience and danger of allowing contracts to be entered into between parties holding such relations to each other are so great that courts of equity construe such contracts *prima facie* to be fraudulent, and they construe a trust to arise from them: 1 Perry on Trusts (6 ed.), § 168. In Section 197, Id., we find the following language:

"It is thus seen that the rule against purchasing by trustees, of the *cestui que trust,* amounts almost to prohibition; for if a trustee purchases the property, and sells it at a profit, he must account for it as a trustee;

not because there was any fraud in the transaction, but because it is against the policy of the law to allow such transactions (without the consent of the *cestui* given freely after he has been fully informed). Nor is it material that there should be an advantage, or profit, arising out of a purchase by the trustee from the *cestui que trust.* It is not necessary to prove such advantage or profit: it is enough to show the relation and the purchase."

The defendant as guardian of the persons and estates of the plaintiffs occupied a fiduciary relation of trust and confidence imposed upon her under the law, and it is contrary to the policy of the law to permit her to speculate and profit by the purchase and sale of the land of her wards and a constructive trust in the proceeds of the sale of the land should be declared: *Parrish* v. *Parrish,* 33 Or. 486 (54 Pac. 352); *Kroll* v. *Coach,* 45 Or. 459, 473 (78 Pac. 397, 80 Pac. 900). In the case of *Borchert* v. *Borchert,* 132 Wis. 593 (113 N. W. 35), brought to establish a constructive trust, and for an accounting under circumstances where an aged mother was induced to convey certain property owned by her to some of her children, upon consideration of their supporting her, the court speaking through Mr. Justice MARSHALL, states the following:

"The point is made that the pleader intended to state a cause of action and to establish a constructive trust and for an accounting, and that the facts alleged are not sufficient in that it appears that the subject of the trust no longer exists, therefore a personal action only will lie. There are three answers to that proposition. One: The primary purpose of the action is to rescind the alleged fraudulent contract. The other matters are germane thereto and so may properly be litigated as incidental to a vindication of the primary right. Two: An action lies to establish a constructive trust and to recover the subject thereof where the property wrongfully obtained in specie, or in its

converted form, still remains in the possession of the wrongdoer. Three: In case of a constructive trust, an action lies in equity for its establishment and for an accounting even though the property wrongfully obtained is personal, or in specie or in some new form into which it can be definitely traced, and is within the reach of a plain remedy at law where it is necessary, in order to establish complete justice, for equity jurisdiction to deal with the situation: 3 Pom. Eq. Jur. 1053."

The court further says:

"This court quite recently held that the better rule is that the *cestui que trust* may always sue in equity for an accounting: *Harrigan* v. *Gilchrist,* 121 Wis. 127, 252 (99 N. W. 909)."

In the case at bar equity would not be divested of jurisdiction by reason of the form of the decree of the lower court being simply a money judgment. Neither is this court bound by the form of such a decree. It should be couched in appropriate language and defendant required to account for the profits realized upon the sale of the land of her wards, and a constructive trust impressed upon the proceeds of the land. The decree of the lower court in substance should be affirmed.

Former opinion adhered to June 4, 1918.

ON REHEARING.

(173 Pac. 461.)

Mr. Guy C. H. Corliss, Mr. Martin W. Hawkins and *Mr. Edward J. Brazell,* for the respondents (applicants for rehearing), with an oral argument by *Mr. Corliss.*

Mr. Henry S. Westbrook and *Messrs. Christopherson & Matthews, contra,* with an oral argument by *Mr. Henry S. Westbrook.*

In Banc.

McBRIDE, C. J.—4. The able petition for rehearing herein created some doubt in the mind of the court as to the soundness of the original opinion concerning the jurisdiction of equity in the premises. Upon a careful review of the authorities and a consideration of the testimony we are satisfied that the result arrived at by Justice BENSON is correct.

The crucial point in the case is stated by Justice BENSON as follows:

"It must be remembered that they are not seeking a rescission of their contracts, or a cancellation of their deeds, but simply to recover the difference between the price received by them and the true value of the property, and for this relief they have a complete remedy at law. When a party has been induced by fraud and deceit to part with his property for an inadequate consideration, he has his election of two remedies; he may affirm the transaction and have his action for damages, or he may repudiate the bargain and call upon a court of equity to aid him in placing the parties in the position they occupied before the deal was consummated, but he cannot have both remedies."

The application of this doctrine here is this: The plaintiffs waive minority as a substantive cause of suit. They do not ask to have the sale set aside or the contract rescinded. Having arrived at majority they had, upon discovery of the alleged fraud, a right to have the deeds set aside and their lands returned to them. But they chose to affirm the sale and thereby stand in the same position as though they had been of

full age. This being true their remaining remedy was by an action at law to damages for the alleged deceit. There is nothing in the case that calls for an intricate accounting or for any investigation that a jury cannot make readily. The price paid plaintiffs for their shares is easily ascertained; the price paid to defendant is admitted and the measure of damages is the difference between the net price paid to plaintiffs and the price received by defendant from her grantee. There is no pretense that the mortgage is worth less than its face. On the contrary the tendency of plaintiffs' evidence is to show that it is ample security for the balance due. There is no pleading or proof that defendant is or is likely to become insolvent, so that with the sale affirmed and the right of rescission waived by the plaintiffs, there is left to them a plain, speedy and adequate remedy at law for damages for the alleged deceit, in which defendant can have the benefit of a jury trial.

We adhere to our former opinion.

FORMER OPINION APPROVED. DECREE REVERSED.

BEAN, J., dissents.

Argued April 24, reversed and remanded June 4, 1918.

ROSEBURG NAT. BANK *v.* CAMP.*

(173 Pac. 313.)

Execution—Sale of Realty and Personalty.

1. Since a judgment debtor may under Sections 240, 244, L. O. L., redeem realty sold on execution, but cannot redeem personalty, and since under Sections 5132, 5136, placer mining claims and ditches are realty, it was error to confirm sale on execution of such claims and pipe-lines and tools thereon in one unsegregated bid and for a lump sum, part of which were personalty, because the amount to be paid in redemption could not be ascertained.

Execution—Sale of Realty and Personalty.

2. In view of Section 238, L. O. L., requiring execution sales of realty to be at the courthouse door, and those of personalty in view of the purchasers, and in view of the different provisions for notice of such sale, as applying to realty and personalty, the statutes do not contemplate an execution sale of realty and personalty *en masse*.

Fixtures—Mode of Annexation.

3. Annexation of personalty to realty is not the sole test whether the fixture is removable, though it is an essential element, and if a chattel is so annexed as to be incapable of severance, it is usually conclusively part of the realty.

[As to what is a sufficient levy of attachment on a fixture, see note in **Ann. Cas. 1916B, 993.**]

Fixtures—Mode of Annexation—Pipe-lines.

4. Pipe-lines for placer mining, attached to water bulkhead and laid over surface of ground, and giants attached to end of the pipe-line, while taken apart and moved each year, are sufficiently attached to the realty to imply annexation.

Fixtures—Adaptation and Use.

5. The element of adaptation to the land and its use is entitled to great weight, in connection with intention, in determining whether fixtures are attached to and part of the realty.

Fixtures—Intent in Making Annexation.

6. In determining whether fixtures are attached to and part of the realty the intention of the party is the most important element, and may be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose and use for which the annexation has been made.

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* For authorities discussing the question as to whether building materials placed on land with the intention of annexing them, but never in fact annexed, are fixtures, see notes in 69 **L. R. A.** 898 and **15 L. R. A. (N. S.)** 727. REPORTER.

Fixtures—Relation of Parties.

7. In determining whether fixtures are attached to and part of the realty, the relation and situation of the party making the annexation is an important factor, and must be taken into consideration.

Fixtures—Between Mortgagor and Mortgagee.

8. Rules for determining whether fixtures are attached to and part of the realty, which apply between grantor and grantee, also apply between mortgagor and mortgagee.

Fixtures—Intent—"Permanent."

9. If the annexation is not intended to be permanent, an article of personal property will not be deemed realty; and for the purpose of discovering whether the annexation was intended to be permanent the degree and mode of annexation may be considered, and also whether the annexation is to make the chattel or the land more useful, but "permanent" does not mean "perpetual," but only continuance until the usefulness of the land or the article passes.

Fixtures—Mortgagor and Mortgagee—Pipe-line.

10. Pipe-lines for placer mining, attached to water bulkhead and laid over surface of ground, and giants attached to end of the pipeline, while taken apart and moved each year, and connected by slip joints, which the mortgagor did not intend to make permanent accessions to his mining claim, were not part of the realty.

From Douglas: GEORGE F. SKIPWORTH, Judge.

Department 1.

The defendants appealed from an order confirming a sale of property which had been sold pursuant to an execution issued on a money judgment and a decree foreclosing a mortgage. On May 27, 1909, E. N. Camp executed and delivered to H. G. Sonnemann a promissory note for $8,681.67 payable on or before two years after date. Camp owned, subject to the paramount title of the United States, 680 acres of unpatented placer mining ground together with ditches and water rights. He also owned mining tools, pipe, giants and buildings, all of which he used in working his mining ground. For the purpose of securing the note Camp gave a mortgage on the 680 acres of mining property "together with all the ditches and water rights and all the mining tools, machinery, pipe, giants and buildings situated thereon." Sonnemann

assigned the note and mortgage to the Roseburg National Bank. The note was not paid and the plaintiff commenced a suit on the note and mortgage. Camp answered, but subsequently on March 27, 1916, pursuant to a stipulation of the parties, a personal judgment was entered against Camp for the amount due on the note and the court decreed the foreclosure of the mortgage and directed that "said mortgaged real and personal property be sold as upon execution." An execution was issued to the sheriff who returned the writ on November 3, 1916. The sheriff recites in his return on the writ that he levied upon the 680 acres "together with all the ditches and water rights and all mining tools, machinery, pipe, giants and buildings situated thereon"; that he gave notice by publication and posting; that he "exposed said property for sale in one parcel, there being no bidder for any less than the whole" and "did sell in one parcel said above described mining property to the said Roseburg National Bank" for the sum of $10,786.86.

At the time of the execution of the mortgage Camp had upon the 680 acres, and the mortgage included, about 10,000 feet of sheet steel hydraulic mining pipe, four giants, shovels, picks, mattocks, crowbars, drills, sledge-hammers, crevice tools, gads and a pipe valve. The four giants, the pipe valve and the pipe were on the ground at the time of the sale on execution. Some of the tools such as crowbars, which were on the ground at the time of the execution of the mortgage still remained on the premises when the sale on execution occurred, but many and perhaps most all the other tools including shovels, mattocks and picks had been broken "and replaced every year."

The pipe is "ordinary slip joint movable pipe" and is used to carry water "from some mining ditch" to the giant. The intake for the pipe-line usually consists of "a penstock or bulkhead which is at the mouth of the ditch," but sometimes the water is taken from the side of the ditch through a temporary gate. The penstock is made of heavy timber and is permanent. The first joint of pipe is "slid" into the penstock and is tamped and calked so as to prevent the "head of water" from washing it out; the end of a second joint of pipe is slipped over the outer end of the first joint and succeeding joints are similarly connected; and the pipe is laid upon the ground to whatever place the water is to be used and a giant is attached to the end of the pipe-line. All the pipe, except the first joint in the penstock, is usually taken apart and re-set each year because the "work is ordinarily changed almost every year." The first joint which is "slid" into the penstock is usually left there, although as stated by one witness "perhaps another year we cut a hole on the other side of the bulkhead and take the water that way."

At the time of the sale on execution two of the giants were disconnected while the other two were connected with the pipe-line; and joints of pipe, aggregating about 2,000 feet, were not connected up but were "just lying loose in stock in different places" on the ground.

The pipe valve had not been used for seven or eight years and was worth about $75. The pipe was worth from 65 cents to $4 per foot, depending upon the size. The two disconnected giants were worth between $350 and $500 and each of the other giants was worth about $250. The value of the tools was probably $400.

The defendants objected to a confirmation of the sale

"for the reason that the said property described in said return as having been sold consisted of both real and personal property and said real and personal property were all sold together in one unsegregated bid and lump sum without defining the bid for either the personal property or the real property.

"There was included in said attempted sale some 680 acres of mining ground held under mining locations and some four giants, several thousand feet of pipe and a large amount of tools and other personal property. That all of said giants, pipe and tools were personal property. That it is impossible to tell what sum was bid for said personal property and what sum bid for said real property and therefore should said sale be confirmed the said defendants and each of them as their interests appear will be prevented from redeeming said real property unless they pay in addition to the sum bid upon said real property the said sum bid upon said personal property. That they will thereby be compelled to repay for said personal property without having the title thereof restored as there is no right of redemption upon personal property."

The objections were overruled; the sale was confirmed; and the defendants appealed.

Reversed and Remanded.

For appellants there was a brief and an oral argument by *Mr. Albert Abraham.*

For respondent there was a brief and an oral argument by *Mr. B. L. Eddy.*

HARRIS, J.—1. A judgment debtor can redeem realty but he cannot redeem personalty when sold on execution: Sections 240 and 244, L. O. L. The unpatented placer mining claims, embraced within the 680 acres, and the ditches are by statute declared to be

real estate: Sections 5132 and 5136, L. O. L. Camp had a right, therefore, to redeem the mining claims and the ditches but he could not redeem the pipe, giants and mining tools if they were personalty. That some of the property was personalty is admitted by the plaintiff, for the mortgaged property is thrice referred to in the complaint as "real and personal property." The Circuit Court recognized that some of the property was personalty for as many as five several times the decree speaks of the mortgaged "real and personal property." Although the tools, the pipe valve, the loose pipe and the two disconnected giants are adapted for use either separately or in connection with the line already laid, nevertheless they are not necessary to make complete, nor are they component parts of, the pipe-line already laid. The joints of pipe which are connected and ready for use make a complete pipe-line; and, therefore, even though it be conceded that the pipe-line laid upon the ground and the two giants connected with the line are a part of the realty, nevertheless the tools, the pipe valve, the 2,000 feet of loose pipe and the disconnected giants are personalty.

2. The statute provides that sales of real property shall be made at the courthouse door, while sales of personal property capable of manual delivery, and not in the possession of a third person, shall be within the view of those who attend the sale: Section 238, L. O. L. The statute also provides for the posting of three notices not less than ten days successively in the case of personal property and for both publishing in a newspaper and posting of a notice for four weeks in the case of real property. The Code does not contemplate a sale of realty and personalty *en masse* but it is plain from every provision of the Code that the per-

sonalty must be segregated and sold separately from the realty. Camp could not in any event redeem the personal property; and yet if the order appealed from stands he could not know how much to tender for the redemption of the realty. If obliged to tender the whole purchase price it would be equivalent to compelling him to pay for the redemption of the realty "the amount of the purchase money" of both the realty and personalty, when the statute only contemplates payment of the amount of the purchase price of the property redeemed. Some of the property sold on execution was indisputably personal property and hence a resale will be necessary.

The plaintiff contends that the pipe and giants which are connected together and laid upon the ground for use in carrying water from the ditches are real property while the defendants insist that they are still personalty; and, since the mortgaged property must be resold, it becomes necessary to determine whether the joints of pipe and giants were transformed from personalty into realty when the owner of the land connected them together and laid them upon the ground for use in placer mining. The pipe and giants are essential for hydraulic mining operations. Placer mining requires water; pipes are necessary to carry the water; and giants are essential to apply it. A placer mining claim without water is only a site for a mine. It is a mere prospect. The pipe and giants were not intended to be used in some employment distinct from the use of the soil but they were placed in position so that the owner could work the ground.

3. The old rule that all things annexed to the realty become a part of it has been much relaxed. Annexation is not the sole test for determining whether a fixture is removable or irremovable. The line between

removable and irremovable fixtures is sometimes so close and difficult to ascertain that it is impossible to frame a precise, unbending and infallible rule which can be applied to all cases. Each case must depend largely upon its own special facts and peculiar circumstances: *Oregon Ry. & N. Co.* v. *Mosier,* 14 Or. 519, 520 (13 Pac. 300, 58 Am. Rep. 321); *Helm* v. *Gilroy,* 20 Or. 517, 522 (26 Pac. 851). In the celebrated case of *Teaff* v. *Hewitt,* 1 Ohio St. 511 (59 Am. Dec. 634), the conclusion was reached that there could be no one test by which to determine in all cases whether a chattel had become a part of the freehold, but that it required the united application of the following tests:

(1) Real or constructive annexation of the article in question to the realty.
(2) Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected.
(3) The intention of the party making the annexation, to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the policy of the law in relation thereto, the structure and mode of the annexation and the purpose or use for which the annexation has been made.

This court, as well as the courts in many other jurisdictions, has approved the formula adopted in *Teaff* v. *Hewitt,* 1 Ohio St. 511 (59 Am. Dec. 634); 19 Cyc. 1037; *Henkle* v. *Dillon,* 15 Or. 610, 614 (17 Pac. 148); *Helm* v. *Gilroy,* 20 Or. 517, 522 (26 Pac. 851); *Honeyman* v. *Thomas,* 25 Or. 539, 540 (36 Pac. 636); *Matthiesen* v. *Arata,* 32 Or. 342, 346 (50 Pac. 1015, 67 Am. St. Rep. 535); *Alberson* v. *Elk Creek Mining Co.,* 39 Or. 552, 558 (65 Pac. 978); *Blanchard* v. *Eureka Planing Mill Co.,* 58 Or. 37, 40 (113 Pac. 55, 37 L. R. A.

(N. S.) 133); *Johnson* v. *Pacific Land Co.,* 84 Or. 356, 361 (164 Pac. 564); *Gates* v. *Public Service Commission,* 86 Or. 442, 451 (167 Pac. 791, 168 Pac. 939).

Annexation, actual or constructive, is an essential element. Pure examples of constructive annexation are found in cases where after having been actually annexed an article is severed from the realty for some temporary purpose. There are a few cases, sometimes called cases of "ideal annexation," like *Byrne* v. *Werner,* 138 Mich. 328 (101 N. W. 555, 110 Am. St. Rep. 315, 69 L. R. A. 900); *Rahm* v. *Domayer,* 137 Iowa, 18 (114 N. W. 546, 15 L. R. A. (N. S.) 727), and *Patton* v. *Moore,* 16 W. Va. 428 (37 Am. Rep. 789), which hold that the intention to devote a chattel to the uses of realty accompanied with the mere act of bringing it on the realty amount to annexation; but in most jurisdictions this doctrine of "ideal annexation" is rejected: 19 Cyc. 1044; *Blue* v. *Gunn,* 114 Tenn. 414 (87 S. W. 408, 108 Am. St. Rep. 912, 4 Ann. Cas. 1157, 69 L. R. A. 892). If a chattel is so annexed as to be incapable of severance without injury to the freehold it is usually conclusive that it has become part of the realty: *Johnson* v. *Pacific Land Co.,* 84 Or. 356, 361 (164 Pac. 564). In the instant case the pipe and giants can be removed without impairing them or injuring the land and therefore the single element of annexation is not conclusive. As was said by this court in *Doscher* v. *Blackiston,* 7 Or. 144, 146: the courts in many of the states have abandoned the notion that to constitute an irremovable fixture the article must be attached to the land by bolts or nails or be imbedded in brick or stone, and

"the true rule now for determining whether a thing is to be regarded as a fixture or not is said to be to consider the character of the act by which the struc-

ture is put in place, the policy of the law connected with its purpose, and the intention of those concerned in the act."

In the recent case of *Johnson* v. *Pacific Land Co.*, 84 Or. 356, 361 (164 Pac. 564), it is said that, although annexation is an essential element to transform a chattel into an irremovable fixture nevertheless

"the extent and mode of actual annexation have but little weight except in so far as it relates to the nature of the article itself, the use to which the same is applied, and other circumstances as indicating the intention of the party making the annexation."

4. Although the pipe and giants are not so attached as to be conclusively a part of the realty, yet the attachment is sufficient to supply the element of annexation: *Doscher* v. *Blackiston*, 7 Or. 144, 146; 19 Cyc. 1040.

5. It must be conceded that the element of adaptation is present. This element is usually entitled to much weight especially when considered in connection with the element of intention; and as stated in *Johnson* v. *Pacific Land Co.*, 84 Or. 356, 362 (164 Pac. 564),

"the tendency is to regard everything as a fixture which has been attached to realty with a view to the purposes for which the realty is held or employed, however slight or temporary the connection between them."

6. The intention of the party making the annexation is the most important element. The intention existing at the time of procuring the article in question, nor that which exists while the article is in transit to the realty on which it is to be placed, nor the secret intention with which it is affixed, does not govern; but the controlling intention is that which the law deduces from all the circumstances of the annexation. The intention is to be inferred from the nature of the

article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose and use for which the annexation has been made: *Young* v. *Hatch,* 99 Me. 465 (59 Atl. 950, 2 Ann. Cas. 374); *Rahm* v. *Domayer,* 137 Iowa, 18 (114 N. W. 546, 15 L. R. A. (N. S.) 727); *Roseville Alta Min. Co.* v. *Iowa Gulch Min. Co.,* 15 Colo. 29 (24 Pac. 920, 22 Am. St. Rep. 373); *Alberson* v. *Elk Creek Min. Co.,* 39 Or. 552, 559 (65 Pac. 978); 19 Cyc. 1046; 11 R. C. L. 1062.

7, 8. The relation and situation of the party making the annexation is an important factor and must be taken into consideration when attempting to ascertain his intention. The rule governing a grantor and grantee would likewise control a mortgagor and mortgagee and hence whatever would be an irremovable fixture as between a grantor and grantee would also be deemed realty as between a mortgagor and mortgagee. When an article is annexed by a tenant a more liberal rule is applied so that what would be deemed to be realty as between a vendor and purchaser might be no more than a trade or domestic fixture as between a landlord and tenant. The difference in the relationship emphasizes the difference in the intention attributed to the party making the annexation. When additions are made to land by the owner the purpose is usually to enhance the value and to be permanent; but on the other hand when additions are made by a tenant they are usually made for a temporary purpose and not with a view of making them a part of the land; and consequently in order to encourage trade, manufacture and industrial pursuits, the tenant is generally allowed to remove what is apparently annexed to the freehold if affixed for the purpose of trade and not merely for the better enjoyment of the

premises: *Doscher* v. *Blackiston,* 7 Or. 144; *Johnson* v. *Pacific Land Co.,* 84 Or. 356, 361 (164 Pac. 564); *Overman* v. *Sasser,* 107 N. C. 432 (12 S. E. 64, 10 L. R. A. 722); *Young* v. *Hatch,* 99 Me. 465 (59 Atl. 950, 2 Ann. Cas. 374); *Liscombe Falls Gold Min. Co.* v. *Bishop,* 35 Can. Sup. Ct. 539 (2 Ann. Cas. 735).

9. If the annexation is not intended to be permanent an article of personal property will not be deemed realty; and for the purpose of discovering whether the annexation was intended to be permanent the degree and mode of annexation may be considered, and also whether the annexation is to make the chattel or the land more useful. Permanence does not imply that the annexation must be perpetual but it means as stated in 19 Cyc. 1047 "that the article shall, if actually affixed, remain where fastened until worn out, or until the purposes of the realty are accomplished"; or as said in *Fisk* v. *People's Nat. Bank,* 14 Colo. App. 21, 27 (59 Pac. 63),

"that chattels may be permanently an accession to the land, a purpose that they should remain there forever, or even until they are worn out by use, is not necessary. It is sufficient that their situation is to be as permanent as the business in which they are to be used."

10. It is probable and we may assume that the pipe and giants were purchased by the owner and placed upon the ground with the intention of using them for the sole purpose of washing the 680 acres of placer mining ground and without any expectation of afterwards carrying them away or of entirely removing them from the premises; and yet this assumption is not determinative, for the same assumption could also be made with respect to the picks, mattocks and other tools. The very purpose for which the pipe-line was

used necessarily involved annual or possibly more frequent changes in the line, because the pipe-line is taken to the work, wherever that may be, instead of the work to the pipe-line. The pipe-line must be extended from time to time so as to keep pace with the progress made in washing the ground in any given area; or when the place of work is changed the pipe-line must be changed. The joints of pipe are not riveted together but they are connected after the fashion of an ordinary stove-pipe. In brief, the pipe and giants were moved from time to time and from place to place on the premises as convenience might require; and as stated by one witness the pipe "is reset usually every year, being transferred from one place to another, wherever we want to carry the water." The pipe-line was nothing more than a large and heavy implement. Although heavier and consequently more difficult to move, the pipe-line may appropriately be likened to a garden hose. The mortgagor did not intend to make the pipe and giants a *permanent accession* to the land and therefore the pipe-line did not become an irremovable fixture: 19 Cyc. 1047; *Rogers* v. *Brokaw,* 25 N. J. Eq. 496; *Feder* v. *Van Winkle,* 53 N. J. Eq. 370 (33 Atl. 399, 51 Am. St. Rep. 628); *Atlantic Safe Deposit & Trust Co.* v. *Atlantic City Laundry Co.,* 64 N. J. Eq. 140, 145 (53 Atl. 212). The order appealed from is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

Bean, Benson and Burnett, JJ., concur.

Argued at Pendleton May 6, affirmed June 4, 1918.

BOYD *v.* GROVE.

(173 Pac. 310.)

Animals—Trespass—Damages—Nominal Damages.

1. Where plaintiff alleged trespass by 700 of defendant's sheep, and defendants denied, except that 80 sheep got away from the herder and trespassed, but were immediately removed, plaintiff was entitled to at least nominal damages; the trespass being admitted.

Pleading—Reply to Qualified Denial.

2. In trespass, where defendant set up qualified denial, plaintiff was not required to reply.

Trial—Instructions—Questions of Law.

3. In trespass instruction that plaintiff should minimize his damages, and that the jury could consider all circumstances in evidence in determining whether it was plaintiff's duty to act on the issue of damages, was not objectionable as submitting to the jury a question of law.

Damages—Reduction of Loss.

4. The duty of a party injured by the trespass of another is to exercise the diligence of an ordinarily prudent man to minimize the damages.

Trial—Instructions—Requests.

5. In trespass instruction that plaintiff should minimize his damages, and that the jury could consider all circumstances in evidence in determining whether it was plaintiff's duty to act on the issue of damages, was good, as far as it went, and in the absence of a request stating the law more specifically, defendants are not entitled to complain on this ground.

Animals—Evidence—Damages by Animals—Admissibility of Evidence—Opinion.

6. In action for damages to grass by trespass of sheep, it was pertinent to prove that the supply of feed was limited, and to take the opinion of a qualified witness as to the value of the grass consumed.

[As to liability of owners for damage by trespassing animals, see note in 28 Am. Rep. 569.]

Animals—Trespass—Pleading and Proof.

7. Where complaint for trespass alleged usefulness of plaintiff's property for grazing, and that, if overstocked, the grass roots are killed out, and the land permanently injured, and that the trespass so injured the land, there was sufficient foundation for testimony of value of land before and after the trespass.

Evidence—Opinion Evidence—Examination of Witness.

8. In action for trespass and permanent injury to land, while witness could not testify categorically as to *quantum* of damages, he could prove value before and after the trespass by testimony directly stating the difference in value.

Appeal and Error—Harmless Error—Instructions.

9. In trespass, where one element of damage was expense of cleaning irrigation ditch amounting to two days' wages of one man, error, if any, in instructing thereon was harmless, since "*de minimis non curat lex.*"

Evidence—Opinion Evidence—Weight.

10. In trespass for damages to grass, and permanent injury to land, instruction that jury was not bound by opinion of witnesses as to *quantum* of damage, but that the same could be considered with other evidence, was proper.

Evidence—Improper Evidence—Counter Evidence.

11. In trespass, while defendant's testimony as to their attempt to compromise should not have been admitted, plaintiff was, after its admission, entitled to give his version of the conversation.

Trial—Rebuttal Evidence—Scope—Motion to Strike.

12. In trespass, where defendants gave their version of a conversation with plaintiff in which they sought to compromise, plaintiff's rebuttal, giving his version, should have been limited to testimony bearing on that before given; but improper details need not be stricken without proper motion.

Evidence—Improper Evidence—Counter Evidence.

13. In action for trespass, where one defendant improperly detailed his version of conversation, offering compromise, which plaintiff disputed, adding a statement attributed to another defendant, proof that such other made no such statement was properly excluded.

From Harney: DALTON BIGGS, Judge.

In Banc.

This is an action brought to recover damages for trespasses on plaintiff's lands by defendants' sheep. The trespasses are alleged to have taken place April 12, 1917, and May 3, 1917. Plaintiff alleges that the sheep ate the grasses growing on his lands and tramped out the roots.

The jury found for plaintiff in the sum of $300 and defendants appeal from a judgment on this verdict.

AFFIRMED.

For appellants there was a brief with oral arguments by *Mr. P. J. Gallagher* and *Mr. William H. Brooke.*

For respondent there was a brief with oral argument by *Mr. Charles W. Ellis.*

McCAMANT, J.—1. Error is assigned on the instruction given that plaintiff was entitled to at least nominal damages. The fifth paragraph in the first count of the complaint is as follows:

"That on or about the 12th day of April, 1917, the defendants wrongfully, unlawfully, and without the plaintiff's consent, and against his will, herded, grazed, and pastured a band of approximately 700 of their sheep on the said land, they well knowing that the land belonged to the plaintiff and that the plaintiff would not permit trespassing thereon, and whereby on account of the said acts of the defendants the pasture for the said lands was injured for the year 1917 and the roots of the grasses growing thereon in many places permanently injured; that a part of the said land was fenced."

The corresponding portion of the answer is as follows:

"[Defendants] deny that on April 12th, 1917, or at any other time approximately 700 or any other number of their sheep were herded, grazed or pastured on said land and allege that on said date about 80 sheep got away from their herder and entered the said land, but were immediately taken out by the said herder."

2. Defendants clearly admit a trespass and it is elementary that a party guilty of trespass must pay at least nominal damages. The portion of the answer above quoted is a qualified denial; for this reason and

also because it is not specially pleaded, plaintiff was not required to reply.

Defendants contended that by the exercise of reasonable diligence at the time of the first trespass plaintiff could have driven the sheep off his premises and thus minimized the damages. In response to this contention the court instructed the jury as follows:

"It is also the duty of a person seeing himself damaged or about to be damaged, to use reasonable efforts to prevent or minimize those damages; and therefore you may consider all of the circumstances detailed to you in evidence in this case in determining whether, under the peculiar circumstances of this case, it was the duty of this plaintiff to take any action in the premises, to minimize or reduce his damages; and you may consider this in determining the damages to which you may think the plaintiff is entitled in this case, if any."

3–5. Defendants claim that this instruction is erroneous as passing a question of law up to the jury. We do not think that the instruction is open to this criticism. The duty of a party injured by the tort of another is to exercise the diligence of an ordinarily prudent man to minimize the damages: *American Smelting & Refining Co.* v. *Riverside Dairy,* 236 Fed. 510, 514 (149 C. C. A. 562). If under the testimony only one inference can be drawn as to the plaintiff's duty, the question is one of law for the court. Otherwise the question is for the jury: *Richmond* v. *McNeill,* 31 Or. 342, 352, 353 (49 Pac. 879). We cannot say as a matter of law that plaintiff failed to exercise the diligence of a reasonably prudent man in the respect pointed out and the court did not err therefore in leaving the question with the jury. The instruction given was good as far as it went. In the absence of a request stating the law more specifically, defendants are not entitled to

complain on this ground: *Kincart* v. *Shambrook,* 64 Or. 27, 32 (128 Pac. 1003).

Defendants invoke the principle that special damages cannot be recovered unless a foundation for such recovery is laid in the pleadings. It is contended that this principle was violated in the admission of testimony. After proof had been received of the trespasses alleged in the complaint, the court received evidence over defendants' objection and exception that at the time in question the feed was about all gone in the part of Harney County in which plaintiff lived. Thereupon over objection and exception the following question was answered:

"What would be the market value of that feed [the grass consumed by the sheep] in that community at that time, under those circumstances, for the purpose of saving stock, as you have told here?"

The first answer was:

"That grass would be worth $300 to $400 to anybody with poor stock."

This answer was stricken out and the witness thereupon said that the feed would be worth $300 to $400.

6. We do not think that the testimony so received and other testimony to the same purport were open to the objection urged. Market value is usually dependent on demand and supply. It was therefore pertinent to prove that the supply of feed was limited and to take the opinion of a qualified witness as to the value of the grass consumed by defendants' sheep: *Pacific Livestock Co.* v. *Murray,* 45 Or. 103, 109 (76 Pac. 1079). That this testimony tends to prove general as distinguished from special damages is taught by *Wheeler* v. *O'Brien Brothers* (Nev.), 165 Pac. 339.

7. Defendants also contend that no foundation was laid in the pleadings for testimony as to the injury to

plaintiff's freehold. The complaint alleges the usefulness of plaintiff's property for grazing purposes and that if it is overstocked the roots of the grasses are tramped out and the land is permanently injured. It is then charged that the land was so injured by the trespasses complained of. We think that the pleadings lay a foundation for plaintiff's testimony on this subject.

8. After testimony to the value of the grass consumed by defendants' sheep, plaintiff testified that there was more or less permanent injury to his property as the result of the trespasses. Thereupon over defendants' objection and exception he was permitted to answer the following question:

"How much less, if any, was the market value of your premises immediately after the sheep had trespassed upon it as you have related, than they were immediately prior to the time the sheep trespassed?"

The answer was $600 or $700. It is well settled in this jurisdiction that a witness cannot testify categorically as to the quantum of damages sustained by a plaintiff through the acts complained of: *Montgomery* v. *Somers,* 50 Or. 259, 262 (90 Pac. 674); *Pacific Ry. & Nav. Co.* v. *Elmore Packing Co.,* 60 Or. 534, 538, (120 Pac. 389, Ann. Cas. 1914A, 371). But the foregoing testimony does not come within the above rule. It was competent for plaintiff to prove by the opinion evidence of a qualified witness the value of his property before the trespass and also to prove its value after the trespass by the same character of testimony: *Blagen* v. *Thompson,* 23 Or. 239, 259 (31 Pac. 647, 18 L. R. A. 315); *Ruckman* v. *Imbler Lumber Co.,* 42 Or. 231, 233 (70 Pac. 811); *Willis* v. *Horticultural Fire Relief,* 77 Or. 621, 627 (152 Pac. 259). This being well settled, it would seem very technical to exclude testimony to the same

end which is distinguishable only in that the witness subtracts the one sum from the other and testifies to the remainder. That such testimony may be received without error is the doctrine of *Portland* v. *Kamm,* 10 Or. 383, 384, 385; *Blagen* v. *Thompson,* 23 Or. 239, 259–261 (31 Pac. 647, 18 L. R. A. 315), and *Portland* v. *Tigard,* 64 Or. 404, 405, 406 (129 Pac. 755, 130 Pac. 982).

9. A part of plaintiff's damages consisted in the blocking of his irrigation ditch by debris which rolled therein as a result of the trespasses. Defendants cite *Clark Lloyd Lumber Co.* v. *Puget Sound C. R. Co.,* 92 Wash. 601 (159 Pac. 774), to the effect that the measure of damages in such case is the expense of removing the debris. The testimony of plaintiff is that it took one man two days to clean out this ditch. This was an unimportant element in plaintiff's damage and the error, if any, in instructing as to the measure of damages could not have appreciably affected the verdict. *De minimis non curat lex.*

10. The two material elements of damage relied on are the value of the grass consumed and the permanent injury to the property arising by tramping out the roots of the vegetation. The following instruction on the measure of damages was substantially right and is approved:

"There has been some testimony in this case by way of opinion of witnesses, as to the value of the pasture destroyed, and as to the depreciation in the value of the land by reason of the acts of the defendants' sheep. You are not bound in this case to be governed by the opinion of any man as to the value of this pasture, or as to the depreciation in value of the freehold. You may consider that evidence, however, along with other evidence, in determining for yourself what the market value of the pasture destroyed was, and also what the depreciation, if any, was in the freehold."

Over plaintiff's objection defendants offered evidence of a conversation between plaintiff and the defendant Garcia in which the latter offered to pay whatever damage plaintiff had sustained and in which plaintiff said he would leave the damages to a jury. On rebuttal plaintiff testified on this subject as follows:

"The conversation was that Joe Garcia came up the road and met me and Mr. Al Wallace talking. I told him, I says, 'There has been some of your sheep down in my field,' I says, 'also they have been in my wife's field. Did she say anything to you about it?' He says, 'Yes, I was just talking to her.' I says, 'The sheep came on down into my field the other day, too.' I says, 'Harrison Grove is telling about—as I understand, he was going about—.' "

At this point counsel for defendants said:

"We object to this as incompetent, irrelevant, and immaterial, and making a self-serving declaration."

The objection was overruled, an exception allowed and thereupon the witness continued as follows:

"I says, 'Bob Miller and others told me Harrison Grove made the remark at Trout Creek, he was going to come to Cottonwood Creek and eat the Cottonwood people's dooryards out.' He said before other people, he was coming to Cottonwood and eat them Cottonwood people's dooryards out. Garcia says, 'He ain't got nothing to do with the sheep; he couldn't have said it. I am running these sheep,' and he says, 'If they have done any damage,' he says, 'why,' he says, 'It is up to me.' I says, 'Who would you leave it to—you or me? I wouldn't ask you to leave it to me and I wouldn't leave it to you.' I says, 'Leave it to a disinterested party, or to a jury to settle this matter.' And he drove off."

At one point the witness was interrupted in making the above answer, by an objection preferred by de-

fendants. No exception was reserved to the ruling of the court on this objection.

11, 12. The testimony offered by defendants tended merely to show an attempt on their part to compromise or adjust the controversy. This testimony should not have been received, but after it was received plaintiff was entitled to give his version of the conversation: Jones on Evidence (2 ed.), § 172; *Bogk* v. *Gassert*, 149 U. S. 17, 24, 25 (37 L. Ed. 631, 13 Sup. Ct. Rep. 738). It is true that the only portion of the conversation which was receivable under this rule is that portion of it which bore on the same subject and was explanatory of the part first testified to: 3 Wigmore on Evidence, 2113; Jones on Evidence (2 ed.), §§ 822 and 873; *Commonwealth* v. *Keyes*, 11 Gray (77 Mass.), 323, 325; *Garey* v. *Nicholson*, 24 Wend. (N. Y.) 350, 353, 354; *Atherton* v. *Defreeze*, 129 Mich. 364 (88 N. W. 886). If, therefore, defendants had moved to strike out so much of plaintiff's testimony as related to what Miller and others had told him, the motion should have been allowed. No such motion was made. If requested so to do by defendants, the court should have cautioned the witness to state only so much of the conversation as related to the trespass and the payment of damages therefor. No such request was made. Defendants' objections went to the detailing by plaintiff of his version of the conversation; these objections were not well taken.

13. Defendants offered to prove that Harrison Grove had not made the remark attributed to him by plaintiff's testimony as to what Miller and others had said, but no error was committed in excluding this testimony. Both parties had given their versions of a conversation which was itself immaterial. The trial would have been carried far afield by the investiga-

tion of the truth of hearsay statements quoted by one of the parties thereto.

We find no substantial error and the judgment is affirmed. AFFIRMED.

Argued at Pendleton May 8, affirmed June 4, 1918.

DAVIDHIZAR *v.* ELGIN FORWARDING CO.

(173 Pac. 893.)

Attorney and Client—Powers of Attorney—Satisfaction of Judgment.

1. Under Section 1083, L. O. L., authorizing attorney to discharge claim and acknowledge satisfaction of judgment, where client obtained judgment for return of property or for its value, his attorney had power to satisfy the judgment upon payment of the assessed value.

Replevin—Satisfaction of Judgment—Effect.

2. Where owner of wheat attached by sheriff secured judgment against sheriff for the wheat or its value and accepted the assessed value in cash from the sheriff, title was transferred to the sheriff.

Sales—Transfer of Title—Executory Contracts.

3. A letter confirming sale of wheat to be delivered upon certain terms as soon as threshed was a mere executory contract, passing no present title, and insufficient to support replevin by the purchaser of the wheat.

Replevin—Satisfaction of Judgment—Effect.

4. Where sheriff with attachment against a debtor levied it on wheat found in possession of the debtor's brother, and took the wheat to recover which the brother maintained replevin, securing judgment for the wheat or its value, and accepted the cash value of the wheat, it was immaterial whether the forms for attaching property in the hands of a third person were followed, since the satisfaction of the judgment in replevin transferred the title to the sheriff.

Attachment—Bailee of Sheriff.

5. Where defendant, having executory contract to buy wheat from third person, accepted the wheat from the sheriff, who had attached it in such person's hands, and issued warehouse receipts to the sheriff it became the sheriff's bailee, and in a way attorned to him.

Sales—Transfer of Title—Executory Contracts—Performance—Acts in Derogation.

6. Where owner of wheat had executory contract to sell it to defendant, but on the way to the warehouse it was attached by the

sheriff, who sent note to defendant, requiring it to hold the wheat for it, the owner's act in delivering the wheat was not in performance, but in derogation of the contract to sell the wheat, and the defendant acquired no title, but merely possession as bailee of the sheriff.

Sales—Transfer of Title—Delivery to Sheriff.

7. Where a third person contracted to sell wheat to defendant, and while he was delivering it, it was attached by the sheriff, since it was competent for him, under Section 304, L. O. L., to deliver the property to the sheriff, when the sheriff then delivered it to the defendant as his own bailee and received warehouse receipts from defendant, defendant could not say that the delivery amounted to performance of the executory contract.

[As to replevin for property seized under execution, see notes in 20 Am. Dec. 696; 80 Am. St. Rep. 751.]

From Wallowa: JOHN W. KNOWLES, Judge.

In Banc.

This is an action wherein the plaintiff, claiming to be the owner thereof, seeks to recover the immediate possession of 531 bags of wheat, covered by the defendant's nine warehouse receipts. The complaint is in the usual form, alleging the detention of the property by the defendant in Wallowa County and claiming damages as usual in such actions.

It is alleged in the complaint and admitted by the answer that the plaintiff demanded possession of the grain from the defendant prior to the commencement of the action, but that the same was refused by the defendant. The answer denies that the plaintiff is the owner of or entitled to possession of the grain, and traverses the allegation that the defendant is in possession of the property and unlawfully detains the same from the plaintiff. It alleges that the wheat in question is a portion of that grown and owned by one Ed Simmons during the season of 1916, and that on August 26th of that year he sold to the defendant the entire crop, consisting of about 3,000 bushels, including the portion described in the complaint. The

answer claims that the wheat was delivered to the defendant by virtue of the terms of the sale from Simmons to the defendant, and that ever since then the latter has been in possession of all the wheat.

The reply admits that the wheat was part of the Ed Simmons crop, but denies all the other averments of the answer. For further reply a history is given of an action instituted by this plaintiff against one J. D. Simmons on a promissory note from him to the plaintiff, including the issuance of a writ of attachment, armed with which, Edgar Marvin, the sheriff of Wallowa County, attached the grain in question as the property of J. D. Simmons; and that afterwards Ed Simmons sued Marvin in replevin for the wheat so attached and recovered judgment in the alternative for the delivery of the property or for the value thereof assessed by the jury, if delivery could not be had. It is averred also that, having attached the property, the sheriff delivered the same to the defendant and took its warehouse receipts in his name in the usual statutory form; and that after Ed Simmons had recovered the alternative judgment named, the defendant sheriff paid the money judgment for the value of the wheat to Ed Simmons, who accepted the same and satisfied the judgment of record.

At the close of all the testimony both parties moved for a directed verdict and the court ordered the jury to return a verdict for the plaintiff for the recovery of the possession of the property or in default thereof for the value assessed at $2,182.65. The defendant appeals. AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. A. W. Schaupp* and *Mr. Francis S. Ivanhoe.*

For respondent there was a brief over the names of *Mr. James A. Burleigh* and *Messrs. Boyd & Hawkins,* with an oral argument by *Mr. Burleigh.*

BURNETT, J.—Substantially the following facts appear in evidence: On August 26, 1916, Ed Simmons addressed to the Elgin Forwarding Company and signed the following writing:

"We confirm sale to you of about 3,000 bushels F. F. wheat, basis No. 1 Portland grading (or my entire crop of 80 acres, with reservation of 40 bags for seed and feed) at $1.15 per bushel, f. o. b. warehouse, Joseph, Oregon, Elgin Forwarding Co. to furnish bags and sack twine. Delivery as soon as threshed, 1916. Amount advanced $200.00."

Afterwards the plaintiff here commenced an action against J. D. Simmons upon a promissory note and caused an attachment writ to be issued and placed in the hands of Edgar Marvin, the sheriff of the county, with directions to attach the wheat in question as the property of the debtor in the writ. With the writ in his possession the sheriff met Ed Simmons on his way to Joseph with some of the wheat loaded on wagons, and told him that the wheat was attached and to take it to the Elgin Forwarding Company and have it stored in the name of Edgar Marvin. The officer also made arrangement with Ed Simmons to haul in the rest of the crop and deliver it to the defendant to be stored in Marvin's name. At the same time the sheriff wrote and sent to the defendant by Simmons the following message:

"Enterprise, Ore., Oct. 31, 1916.

"Elgin Ford. Co.,

"This grain is under attachment and you will please accept it in my name; 2 loads today 70 sacks, and all other that they will haul this week.

"EDGAR MARVIN."

1. In pursuance of this arrangement the defendant accepted from Ed Simmons the two loads mentioned in the writing just quoted, and the balance of the crop in question remaining on the farm, and issued to Marvin receipts covering the same in the usual warehouse form.

Still later Ed Simmons commenced the action of replevin against the sheriff and recovered the usual alternative judgment, the value being assessed at $1,328. Soon after the rendition of this alternative judgment in favor of Simmons against Marvin the latter paid the money value thereby assessed and Simmons by his attorneys accepted the same and satisfied the judgment in full, entering upon the margin of the record of the judgment the following writing:

"State of Oregon,
County of Wallowa,—ss.

"January 6, 1917.

"In consideration of the payment of the within judgment full and complete satisfaction of the within judgment is hereby acknowledged."

This was signed by one of the attorneys for Ed Simmons and attested by the county clerk. The satisfaction of the judgment was within the authority of the attorney under Section 1083, L. O. L., reading thus:

"An attorney has authority, * *

"2. To receive money or property claimed by his client in an action, suit, or proceeding, during the pendency thereof, or within three years after judgment or decree, and upon the payment or delivery thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment or decree."

2. The evidence is ample that Simmons accepted the money and applied it to payment of his own obligations, having knowledge of all the facts and transactions from which the money was derived. This

amounts to a ratification of the discharge of the judgment independent of the attorney's statutory authority. The operation of this transaction was to transfer the title to Marvin.

The plaintiff here furnished the money with which Marvin satisfied the judgment and the latter indorsed to him the warehouse receipts which the defendant had issued. The plaintiff then presented these receipts to the defendant and demanded possession of the wheat represented thereby. The latter refused to surrender the grain and Davidhizar brought this action resulting in the alternative judgment in his favor against the Elgin Forwarding Company involved in this appeal.

3. In effect both parties attempt to deraign title from Ed Simmons. The writing upon which the defendant relies, considered most favorably for its contention, is not more than an executory contract that does not pass any present title and will not support replevin: *Hubler* v. *Gaston,* 9 Or. 66 (42 Am. Rep. 794); *Rosenthal* v. *Kahn,* 19 Or. 571 (24 Pac. 989); *Hamilton* v. *Gordon,* 22 Or. 560 (30 Pac. 495); *La Vie* v. *Crobsy,* 43 Or. 612 (74 Pac. 220); *Gile & Co.* v. *Laselle, post,* p. 107 (172 Pac. 741). Under this instrument the defendant had no title to the wheat and it was competent for Ed Simmons to transfer the title to any third person, incurring the risk, of course, of an action of damages by the Elgin Forwarding Company for breach of his executory contract.

4. Much has been said in the briefs and argument about the invalidity of the attachment, the claim being that when property is found in the hands of a third person it shall be attached by leaving a notice of garnishment with that individual and hence that the act of the sheriff in taking possession of the property from Ed Simmons under a writ of attachment against J. D.

Simmons was void and inoperative. The attachment, however, is not the vital factor in the case. So far as that is concerned it is immaterial whether Marvin took the property under the forms of law, as by attachment, or by force without the consent of Simmons. The title to the property as between Simmons and Marvin is to be determined by the legal effect of the satisfaction of the judgment which the former recovered against the latter. Simmons, who was in the rightful possession and ownership of the property when the sheriff took custody of it, had a right to maintain replevin for it. Having recovered the usual alternative judgment, it was within the power of Simmons and Marvin to make such composition of it as they saw fit. Marvin could have satisfied it if he chose, by returning the property, and this whether Simmons was willing to receive it or not. On the other hand, Simmons had no right to the money judgment if delivery of the property could be had. But it was competent for Simmons to accept Marvin's offer to pay the money and to satisfy the judgment. This was done and the legal effect of accepting the money judgment is to pass the title to the wheat from Simmons to Marvin: Cobbey on Replevin (2 ed.), §§ 1174, 1178; *First Nat. Bank* v. *Johnston,* 161 N. C. 506 (77 S. E. 404); *Duroth Mfg. Co.* v. *Cauffiel,* 243 Pa. 24 (89 Atl. 798). It is analogous to the situation in actions of trover where the plaintiff seeks to recover damages for the conversion of his property. On satisfaction of a judgment for damages the title to the property passes to the judgment debtor. Some authorities are collated in *Acheson* v. *Miller,* 2 Ohio St. 203 (59 Am. Dec. 663).

5. When it accepted custody of the wheat from Marvin and issued to him its warehouse receipts for the same, the defendant became Marvin's bailee. In a

certain sense it recognized his title and, so to speak, attorned to him. The principle is thus stated in 6 C. J. 1108:

"The more generally accepted rule is that the bailee may not deny the title of the bailor, either by claiming title in himself, or by alleging title in another, subject, however, to the exceptions that the bailee may show as against the claim of the bailor that he has been deprived of the property by process of law, or has yielded possession to one having paramount title, or that he is defending on the title and right and by the authority of a third person."

None of these exceptions is disclosed by the evidence in the case at bar.

6, 7. Although Ed Simmons may have actually delivered the wheat to the warehouse, yet he did so as the agent of Marvin and so acted in derogation and not in performance of the executory contract mentioned. When the sheriff applied to Simmons with the writ of attachment and undertook to attach the wheat it was competent for Simmons as a garnishee to deliver the property to the sheriff: Section 304, L. O. L. The officer, thus having actual custody of the property, could deliver it to the defendant as his own bailee, and the latter, having accepted the same in that capacity as shown by its own warehouse receipts, cannot now say that the delivery, although in fact accomplished by Simmons as the servant of Marvin, amounted to a performance of the previous executory contract. In short, no title passed from Simmons to the defendant. At the utmost all that the latter has in the transaction is a cause of action against Simmons for the breach of his contract to sell the wheat. On the other hand, the plaintiff traces his title to Simmons through Marvin by virtue of the latter's payment of the judgment and the acceptance thereof

by Simmons coupled with Marvin's indorsement of the receipts to the plaintiff.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Argued at Pendleton May 6, affirmed June 4, 1918.

FARMERS' STATE BANK OF NORTH POWDER v. FORSSTROM.*

(173 Pac. 935.)

Bills and Notes—Accommodation Maker—Liability—Statute.

1. Under Section 5862, L. O. L., one who signed a firm note as maker without receiving value therefor, to lend his name to the firm, is liable on the instrument to a bank holding for value, though the bank, when it took the note, knew he was only an accommodation party.

Bills and Notes—Accommodation Party—Liability.

2. One who signed a firm's note as maker, without receiving value and merely for accommodation, under Section 6023, L. O. L., is primarily liable on the note, and absolutely required to pay.

Bills and Notes — Accommodation Party — Liability to Payee or Holder.

3. One who sign's a firm's note for accommodation, whatever his position on the instrument as between himself and the firm, as to the payee or holder he does not stand as an indorser or one secondarily liable, and is not entitled so to be treated.

[As to rights and liabilities of makers and indorsers of accommodation paper, see note in 31 **Am. St. Rep.** 745.]

Bills and Notes—Accommodation Maker—Statement by Payee.

4. Statement by the payee of a note, to one who signed as maker for accommodation only, that he would be safe in signing the note did not change the legal effect of the transaction, which rendered him primarily liable to pay.

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*On effect, under negotiable instrument law, of extension of time to principal, to release one who, on the face of the instrument, is primarily liable, but who is in fact surety, see notes in 10 **L. R. A. (N. S.)** 129 and 26 **L. R. A. (N. S.)** 99.

On admissibility of parol evidence that written instrument for the payment of money was executed in reliance upon parol promise that payment was subject to a condition not incorporated therein, see note in 18 **L. R. A. (N. S.)** 434. REPORTER.

Evidence—Parol Evidence Affecting Writing—Conditional Signature of Note.

5. In an action on a note against one who signed for accommodation only, there being no fraud charged in its execution, it is not competent for the accommodation maker to allege or prove a contemporaneous parol agreement that under certain conditions he should not be called upon to pay, thereby varying and altering the legal effect of the instrument.

Bills and Notes — Accommodation Maker — Extension of Time — Statute.

6. An accommodation maker, under the Negotiable Instrument Act, Section 5834, L. O. L., et seq., is not relieved from payment of the note by the extension of the time of the payment thereof for a valuable consideration therefor without his consent, though the holder knows him to be only an accommodation maker, as he is primarily liable.

Bills and Notes—Accommodation Maker—Duty to Pay.

7. When a note became due, it was the duty of an accommodation maker, to protect his interests, to pay the note, and then look to his comakers for reimbursement.

Bills and Notes—Accommodation Maker—Postponement of Right to Collect.

8. The accommodation maker of a note cannot complain of the postponement of the payee's right to enforce collection of the instrument made without such maker's assent.

Bills and Notes—Accommodation Maker—Duty.

9. If one of the firm which executed a note with an accommodation maker when it was due arranged with the payee to liquidate the indebtedness on the next day, it was incumbent on the accommodation maker, to free himself from liability, to see that the payment was made.

Bills and Notes — Accommodation Maker — Notice of Dishonor — Statute.

10. An accommodation maker of a note is not entitled to notice of dishonor under Negotiable Instrument Act, Section 5834 et seq., L. O. L.

Bills and Notes—Accommodation Maker—Discharge—Statute.

11. An accommodation maker of a note, being primarily liable, by Section 5952, L. O. L., can claim discharge by an act which will discharge a simple contract for the payment of the money.

In Banc.

This is an action on a promissory note for $2,500—signed by the four defendants in favor of plaintiff. Defendant, James A. Pilcher, alone answered. The trial court sustained plaintiff's demurrer to the

amended answer, and defendant declining to further plead judgment was rendered against him from which he appeals.

The answering defendant, whom we will hereafter designate as defendant, alleged in effect that he signed the note at the request of the firm of Forsstrom-Pilcher Co. and of plaintiff as an accommodation maker without any consideration therefor, which plaintiff well knew; that plaintiff said that there was no danger in signing said note, that the firm of Forsstrom-Pilcher Co. would take care of said note and that plaintiff would see that they did at maturity; that when the note matured, plaintiff notified defendant that the same was due; that one of the firm "made arrangements with the plaintiff for the payment of the note, which arrangements were satisfactory to the plaintiff"; that plaintiff said nothing more to defendant about said note for several months when Forsstrom-Pilcher Co. were bankrupt; that during the period of time ending with the maturity of the note, Forsstrom-Pilcher Co. had on deposit in the plaintiff's bank moneys subject to check aggregating about $100,000, and plaintiff failed to pay the note out of such deposits; that after said note was given plaintiff discounted many notes of said firm; that plaintiff paid other unsecured indebtedness of said firm to itself and allowed the firm to withdraw the balance of the deposits, and to overdraw its account approximately $3,300, which was afterwards paid out of the deposits of the firm; that at the maturity of said note the said Forsstrom-Pilcher Co. was a going. solvent concern but in failing circumstances; that the plaintiff at all times knew the financial condition of said firm while the defendant did not; that defendant applied to plaintiff for information regarding the financial condition

of said firm and plaintiff, with the intention of misleading this defendant and inducing him to take no steps to protect himself against said firm, and in order to collect its unsecured indebtedness and overdrafts against said firm, knowingly gave this defendant false information as to the financial standing of said firm of Forsstrom-Pilcher Co., and stated to this defendant that the said firm was not indebted to plaintiff in any sums except the note sued on herein, when in fact the firm was indebted to plaintiff in large amounts, approximately $3,300 of which was overdrafts; that plaintiff, at the time, concealed the true financial condition of said firm from the defendant; that said defendant relied on said statements of plaintiff and believed them to be true and acted on the same by refraining to take steps to protect himself against said firm and was thereby induced to refrain from taking legal steps to protect himself or compel the payment of the note by said firm until after they became hopelessly insolvent, and was thereby induced to and did refrain from taking steps to obtain adequate security against the same; that the plaintiff took advantage of defendant's inaction resulting from plaintiff's conduct and collected the unsecured indebtedness and overdrafts from said firm to plaintiff and as soon as said firm became bankrupt plaintiff attempted to collect from this answering defendant and brought this action; that plaintiff without defendant's consent for a valuable consideration extended the time of payment of said note; that plaintiff on divers occasions, after the maturity of the note with reasonable diligence, could have paid the note out of the deposits of the firm in said bank, and should have collected the same.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Green & Rudolph* and *Mr. J. D. Slater,* with oral arguments by *Mr. R. J. Green* and *Mr. Slater.*

For respondent there was a brief over the names of *Mr. W. H. Packwood* and *Mr. John L. Rand,* with an oral argument by *Mr. Packwood.*

BEAN, J.—1, 2. The answer, the challenge to which was sustained, is lengthy and somewhat involved. It is denominated both a counterclaim and an estoppel. It is clear that the defendant does not recognize his primary liability on the note that he is absolutely required to pay the same in accordance with that part of the Negotiable Instrument Law contained in Section 6023, L. O. L. The defendant signed the note in suit as maker without receiving value therefor, for the purpose of lending his name to Forsstrom-Pilcher Co. He is therefore liable on the instrument to the plaintiff who is a holder for value, notwithstanding the bank, at the time of taking the note knew that he was only an accommodation party: Section 5862, L. O. L.

3–5. The defendant claims that he has been discharged in the same manner as a surety upon the note. Whatever may be his position on the instrument as between himself and the accommodated party, Forsstrom-Pilcher Co., as to the plaintiff, he does not stand as an indorser, or one secondarily liable on the note and is not entitled to be so treated by plaintiff. The defendant's pleading does not assert that the title of plaintiff to the note is defective. He avers that the bank officials informed him that he would be safe in signing the note. No fraud is claimed in the execution of the instrument, and the legal effect of such signing makes him primarily liable to pay the note.

Any statement by plaintiff to the contrary would not change the legal effect of the transaction: *Wicks* v. *Metcalf*, 83 Or. 687 (163 Pac. 434, 988, L. R. A. 1918A, 493). As there was no fraud charged in the execution of the note, it is not competent for defendant to allege or prove a contemporaneous parol agreement to the effect that under certain conditions defendant would not be called upon to pay the note and thereby vary and alter the legal effect of the instrument: *Portland Nat. Bank* v. *Scott*, 20 Or. 421 (26 Pac. 276); Stearns on Suretyship (2 ed.), § 110.

6. Whatever the law may have been prior to the enactment of the Negotiable Instrument Act in 1899, that law and the decisions thereunder are controlling as to all matters comprehended within its terms. It is settled that under the present law an accommodation maker is not relieved from the payment of his note by an extension of the time of payment thereof for a valuable consideration without his consent, even though the holder may know him to be only an accommodation maker. This is for the reason that a maker, even for accommodation, is by virtue of the statute primarily liable on the instrument: *Cellers* v. *Meachem*, 49 Or. 186 (89 Pac. 426, 13 Ann. Cas. 997, 10 L. R. A. (N. S.) 133); *Murphy* v. *Panter*, 62 Or. 522, 524 (125 Pac. 292); *Lumbermen's Nat. Bank* v *Campbell*, 61 Or. 123 (121 Pac. 427); *Hunter* v. *Harris*, 63 Or. 505, 506 (127 Pac. 786); *Vanderford* v. *Farmers & Mechanics' Nat. Bank*, 105 Md. 164 (66 Atl. 47, 10 L. R. A. (N. S.) 129); *First State Bank of Nortonville* v. *Williams*, 164 Ky. 143 (175 S. W. 10); *Bradley Engineering & Mfg. Co.* v. *Heyburn*, 56 Wash. 628 (106 Pac. 170, 134 Am. St. Rep. 1127); *Lane* v. *Hyder*, 163 Mo. App. 688 (147 S. W. 514); *Wolstenholme* v. *Smith*, 34 Utah, 300 (97 Pac. 329); 8 C. J., p. 276,

§ 431, and notes; 2 Daniel on Negotiable Instruments (6 ed.), § 1312, p. 1477; 3 R. C. L., § 353, p. 1137.

7–10. This rule has been announced in at least eight states, but a different rule appears to prevail in the State of Iowa: Crawford's Annotated Negotiable Instruments Law, p. 200.

Section 5952, L. O. L., provides:

"A negotiable instrument is discharged (1) by payment in due course or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or before maturity in his own right."

This section enacts in definite terms that the instrument, and hence one primarily liable thereon, is discharged in one of five different ways. There is no mention therein of a discharge of an accommodation party by an extension of time, or by other acts such as would discharge a surety before the passage of the negotiable instrument law. It could then be shown that one signing a promissory note apparently as one of the makers was in reality a surety thereon, and as such surety was a favorite of the law, the payee was required to guard his interests with zealous care, although he was an accommodation maker. This in many instances worked a hardship upon the payee or holder of the instrument, and by the negotiable instrument act an accommodation party was taken out of the secondarily liable class, as it were, and classed with the makers of the note, and declared to be primarily liable on the instrument, and absolutely required to pay the same. It was therefore the duty

of the defendant, when the note became due in order to protect his interests, to pay the note and then look to his comakers. He is not in a position to complain because the payee did not promptly enforce the payment of the note. Neither can the defendant complain of the postponement of plaintiff's right to enforce the collection of the instrument made without the assent of the defendant. The plaintiff apparently in the ordinary course of business when the note matured, notified the defendant that it was due. This should have been sufficient. The assertion in the answer that one of the firm of Forsstrom-Pilcher Co. made satisfactory arrangements with plaintiff to pay the note in so far as it appears from the answer, may refer to an agreement on behalf of the firm to liquidate the indebtedness on the next day. If so, it was incumbent upon the defendant to see that this was done. This was his active duty according to the obligation which he had signed. It was not in compliance with his absolute promise to pay for him to rely upon the plaintiff to collect the note of the other defendants; in other words, he is not like an indorser of the note and has no right to demand the same treatment that an indorser could demand. He is not entitled to notice of dishonor.

The manner in which one who is secondarily liable on a note may be discharged is defined by Section 5953, L. O. L., which is as follows:

"A person secondarily liable on the instrument is discharged (1) by any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved: (6) by any

agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

11. There is no mention made in Section 5952 of a discharge of an accommodation party by an extension of time, or by other acts which would release a party secondarily liable. The word "surety" is not found in the negotiable instrument law. Whatever force may attach to the enumeration of ways in which the instrument and consequently the parties primarily liable might be discharged, if this section stood alone, the inference arises from the omission of extension of time, from such enumeration, and the inclusion thereof, among the ways in which persons secondarily liable, and other acts which would discharge persons secondarily liable in Section 5953, is almost unquestionable that the legislature did not intend that persons primarily liable should be discharged in any other manner than as specified in Section 5952: 8 C. J., § 431, p. 277, note 11; *Union Trust Co.* v. *McGinty,* 212 Mass. 205, 207 (98 N. E. 679, Ann. Cas. 1913C, 525, notes). The defendant can claim a discharge by an act which will discharge a simple contract for the payment of the money. His obligation is neither more, nor less, and no different from that of his comaker Therefore in order for the answer to be a defense to the note, as it admits the defendant's liability thereon, in the first instance, it must be equal to a complete counterclaim, or constitute a perfect estoppel.

In our judgment, the answer does not support defendant's defense. If he had been fully informed in regard to the note, as he claims he should have been, he asserts that he could have protected himself. To

what extent, whether to the amount of five cents or five hundred dollars does not appear from defendant's pleading. The answer does not constitute a counterclaim which should contain facts sufficient upon which to base an independent action: Section 73, L. O. L. He does not allege that by reason of misinformation given him by plaintiff, he was injured in any definite amount. Whether or not the matters referred to, if fully pleaded could be interposed as a counterclaim, it is not necessary to determine. The main thing complained of was that the bank permitted the firm of Forsstrom-Pilcher Co. to overdraw their account in about the sum of $3,300 during the time they were depositing about $100,000. This overdraft was afterwards balanced by a deposit. It was evidently not considered by the plaintiff as a regular indebtedness of the firm, but only a temporary balance. It is also alleged to the purport that Forsstrom-Pilcher Co. indorsed various notes to plaintiff and were liable as such indorsees, and thereby largely increased their indebtedness to plaintiff. But it is not shown that they were ever required to pay a dollar by reason of such indorsements. By the answer when fairly construed, the defendant complains because the plaintiff did not do those things which were incumbent upon the defendant himself to do,—that is to see that the note was paid. Defendant complains because he was not further notified by plaintiff to pay the note. How many notices he required is not stated. He failed to heed the one which was given him.

The answer of defendant does not state a defense to the note. There was no error in sustaining the demurrer. The judgment of the lower court is affirmed. AFFIRMED.

Argued April 12, affirmed May 14, rehearing denied June 11, 1918.

GILE & CO. *v.* LASSELLE.

(171 Pac. 741.)

Evidence—Opinion of Witness—Construction of Contract—Province of Court.

1. In view of Section 136, L. O. L., providing that all questions of law and the construction of statutes and other writings are to be decided by the court, and Section 717, providing that for the proper construction of an instrument the circumstances under which it was made, etc., may be shown, so that the judge may be placed in the position of those whose language he is to interpret, permitting a party to a written contract to state what he understood by term "time is of the essence of the contract," and to state whether according to his understanding title passed until certain things were done, was error.

Appeal and Error—Permitting Witness to Construe Contract—Harmless Error.

2. Where decision was in harmony with true construction of written contract, permitting a witness who was a party to the contract to construe it was harmless.

Evidence—Judicial Knowledge—Fruit Season.

3. The Supreme Court, by putting itself in the position of the parties on June 27, 1916, when contract was made, as it is required to do by Section 717, L. O. L., knows by the laws of nature and the fruit season that no present crop of prunes of the season of 1916 was dried and ready for shipment on June 27th.

Sales—Transfer of Title—Property not in Existence.

4. One cannot presently convey title to property which is not in existence.

[As to sales of property not in existence, see note in 81 Am. St. Rep. 42.]

Sales—Contract for Future Delivery—Title.

5. One may make a contract for future delivery, though he has no property of the kind on hand when the contract is made.

Sales—Sale of Crop—Passing of Title.

6. Provision of contract for sale of year's crop of prunes that it is understood by both parties to constitute an absolute sale, and that seller assumes all risk of loss or damage until delivery, amounts to no more than saying that when the terms of the writing have been fulfilled the result will be an absolute sale.

Sales—Executory Contracts—Passing Title.

7. To pass title under an executory contract there must be some further act of the parties amounting to performance of executory

feature when property actually comes into existence and possession of seller.

Sales—Executory Contract—Right of Possession.

8. Contract for sale of year's crop of prunes, providing that it constitutes an absolute sale, that seller assumes risk of loss or damage until delivery, that buyers agreed to pay for said crop when delivery is completed, etc., was executory, and buyers were not entitled to possession until they performed concurrent covenant of paying at time of delivery; such covenant not having been waived.

Equity—Maxims—Mortgage in Advance of Acquisition.

9. Where chattels are mortgaged in advance of their acquisition, the court sitting in chancery will construe the mortgage as pledging the property the instant it subsequently comes into the mortgagor's ownership, on the ground that equity will consider that as done which ought to have been done.

Sales—Remedy of Buyer—Recovery of Goods.

10. Since a claim under an executory contract for the sale of a year's crop of prunes will not support replevin by the buyers against the seller, replevin will not lie against defendant who purchased prunes after seller got possession and before plaintiff buyers performed concurrent covenant of paying at time of delivery.

Trial—Argumentative Instructions—Refusal.

11. In replevin, where plaintiff claimed the property in its own right and defendant claimed it as bailee for his principal and also sought damages for detention, a requested instruction that the only damages that could be assessed against plaintiff is the sum of one cent per pound for the property taken from defendant, as defendant pleads the property right to have been in a named person and defendant's interest in said property to have been only a contract to process at a stipulated price per pound, *held* argumentative and misleading under pleadings and evidence and properly refused in view of Section 153, L. O. L., making a distinction as to the value of the property and damages for its detention.

Appeal and Error—Error Favorable to Complaining Party.

12. In replevin, where plaintiff claimed property in its own right and defendant claimed as bailee for his principal, refusal of plaintiff's requested instruction which would have allowed a recovery of the gross sum of one cent per pound as damages without deduction for necessary expenses and labor, *held*, harmless, since, if treated as a precept for the measure of damages for detention it would have been harmful to plaintiff.

Appeal and Error—Instructions not Supported by Pleadings or Evidence—Harmless Error.

13. Where the outcome of the case should have been the same regardless of estoppel, error in giving instruction on estoppel is negligible.

From Linn: PERCY R. KELLY, Judge.

Department 1.

This is an action of replevin in which the plaintiffs seek to recover "about 794 bags of Oregon prunes," containing "about 70,000 pounds" of the value of $4,500. They allege that the property was in possession of one Percival I. Rust, on storage by them, subject to their order and shipping directions, and that the defendant wrongfully took the prunes from the possession of Rust, caused them to be loaded into a railway car and shipped to Albany where the defendant detains them unlawfully to the plaintiffs' damage in the sum of $350. They demand judgment for the recovery of possession of the property, or for $4,500 as its value alternatively, together with $350 damages.

The answer denies the whole complaint and avers that a partnership by the name of John H. Leslie & Company of Chicago, Illinois, employed the defendant, as its agent, to purchase, treat and pack prunes, in pursuance of which he purchased from Rust 74,661 pounds of prunes of the reasonable value of $5,200, the same being contained in the 794 bags and being the identical prunes described in the plaintiffs' complaint. He says, also, that for his services so rendered, he was to receive a commission of one cent per pound, and that after the fruit had been properly treated and packed he was required to ship it immediately to Leslie & Company. He avers that he bought the prunes in question with the money of his principal, took it into his own custody and, while he was engaged in treating and packing it, the plaintiffs took the same by virtue of a writ of replevin issued in the present case. He states that at the time alleged in the complaint he was, and at all times since then, has been and still is entitled to the immediate possession of the prunes and the whole thereof; that Leslie & Company are the

absolute owners of said property and that this defendant as their agent is entitled to the immediate possession thereof.

Further answering, the defendant sets up a contract entered into on June 27, 1916, between the plaintiffs and Rust, of which the following is a copy:

"BUYING CONTRACT.

"Roseburg, Oregon, June 27, 1916.

"In consideration of the prices per pound herein specified, Percival I. Rust, the seller, has sold, and H. S. Gile Company, the buyer, has bought the hereinbefore mentioned 1916 crop of prunes produced during the current year, upon the following described property, the output of his dryer at Cottage Grove, guaranteed to not be less than one minimum carload, which crop said seller agrees to properly dry, cure and deliver in its entirety, unless otherwise agreed to in writing by buyer, and hereby guarantees to be the sole and absolute property of seller, and free from all incumbrances, except as herein specified, and which, with the price per pound, variety and quantity (estimated by the seller) is as follows:

"Quantity, 40,000 lbs. or more. Variety, Italians. Price paid per pound for prunes testing between 30–35, 6¼cts.; 35–40, 6 cts.; 40–45, 5¾ cts.; 45–50, 5½ cts.; 50–55, 5¼ cts.; 55–60, 5 cts.; 60–65, 4¾ cts.; 65–70, 4½ cts.; 70–75, 4½ cts.; 75–80, 4 cts.; 80–85, 3¾ cts.; 85–90, 3½ cts.; 90–95, 3¼ cts.; 95–100, 3 cts.; 100 over —— cts., delivered f.o.b. cars Cottage Grove, sax to be furnished by the buyer. French or Petites same prices as Italians.

"Said buyer agrees to pay for said crop at the price named, when delivery is completed, provided the seller delivers the same thoroughly and properly dried and cured, and free from burned or soft fruit, and in good marketable and merchantable condition. Delivery to be made in bags as soon as buyer requests after drying, but not later than Nov. 15th, 1916.

"Buyer shall be entitled to weigh back and reject any portion of crop delivered, not conforming with the

terms and conditions of this contract, and such rejection by buyer shall not invalidate this contract or release the seller from any of its obligations.

"Buyer to accept prunes as to count and grade only after prunes have been put in bags.

"This contract is understood by both parties to constitute an absolute sale, but until delivery has been completed seller agrees to and does assume all risk of loss or damage.

"Time is the essence of this contract.

"No alterations or erasures permitted, save with the written consent of the buyer.

"In the event of strikes, quarantine, fire or failure of transportation companies to provide cars, buyer may extend time of delivery under this contract, for a period equal to that so lost, and designate another reasonable point of delivery.

"PERCIVAL I. RUST, Seller.
"H. S. GILE & COMPANY, Buyer.
"By R. L. GILE."

He states that at the time this agreement was made, Rust was not the owner of any prunes of any kind or nature, nor of any orchard or trees upon which such fruit would grow, nor was he the owner of any contracts for prunes, all of which was known and understood by both him and plaintiffs. The defendant claims that he bought the property in question from Rust about November 23, 1916, in good faith, believing that Rust was the owner thereof.

For another answer the defendant pleads what he claims is an estoppel operating against the plaintiffs and denying them the right to claim property in the fruit in question on the ground that they permitted Rust to retain the possession of it, to employ labor in and about it and to exercise acts of ownership over it; that finding Rust in possession of the property under such circumstances and being without any knowledge or intimation that plaintiff had any right

to it, the defendant bought the same for his principal, paid Rust the price thereof and took it into his own possession.

The reply challenges the new matter in the answer in material particulars, avows the making of the contract quoted in the defendant's pleading and states that in pursuance thereof Rust did afterwards produce, procure and have ready for delivery the prunes here involved and notified the plaintiffs that the same were ready for delivery; that they thereupon shipped to him the necessary sacks to contain them, having thereon the firm name of the plaintiffs, into which defendant Rust put the prunes for the purpose of fulfilling the contract; that the fruit was in those bags at the time the defendant took it, which he did with knowledge that it was the property of the plaintiffs. The jury rendered a verdict to the effect that defendant is entitled to a return of the property described as 74,661 pounds of prunes of the value of $5,000, together with damages in the sum of $500. Judgment was rendered upon this verdict in favor of the defendant for the return of the property with $500 damages, or, in case the property could not be returned, that the defendant have and recover from the plaintiffs $5,000, together with $500 damages and costs and disbursements. The plaintiffs appeal. AFFIRMED.

For appellants there was a brief over the names of *Mr. William H. Trindle* and *Messrs. Hill & Marks,* with an oral argument by *Mr. Trindle.*

For respondent there was a brief over the names of *Messrs. Weatherford & Weatherford* and *Mr. E. F. Bailey,* with an oral argument by *Mr. James K. Weatherford.*

BURNETT, J.—Both parties attempt to deraign title to the property from Rust. This is an action at law and not a suit in equity and the matter must be adjudicated by legal rules as distinguished from equitable maxims. The crux of the situation is found in the construction to be given to the admitted contract. It is said in Section 136, L. O. L.:

"All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court. * * "

It is also said in Section 717:

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

1–5. The bill of exceptions discloses that the plaintiffs called Mr. Rust as a witness, and among other things, had him identify the contract between himself and the plaintiffs. On cross-examination the defendant's counsel asked him: "What did you understand by this term of the contract, 'Time is of the essence of the contract?' " Another question was as follows:

"Now, Mr. Rust, it states in this contract that the 'said buyer agrees to pay for said crop at the price named, when delivery is completed, provided the seller delivers the same thoroughly and properly dried and cured, and free from burned or soft fruit, and in good marketable and merchantable condition.' Now, what was your understanding in reference to whether any title passed to Gile until all this was done, or not?"

To these and similar questions the plaintiffs objected on the ground that they had a tendency to vary the terms of the written instrument which appear clearly upon its face and also that they were not proper on cross-examination. The court overruled this objection. This ruling was manifestly erroneous, because it allowed the witness to construe the contract, thus invading the function of the trial judge under the excerpts from the Code above set out. The view of the contract which we adopt, however, makes this error harmless because the result reached was in harmony with the true meaning of the instrument which ought to have been stated by the trial judge without hearing Rust's construction.

The theory of the plaintiffs is that the legal effect of the agreement in question was to transfer the title to the property from Rust to them, if not at its date, at least at the moment when he had in his possession as the output of his drier, dried prunes which were suitable for filling the contract. The defendant maintains that at best it was an executory agreement which conveyed to the plaintiffs no present title or right of immediate possession without which they cannot maintain replevin. Putting ourselves in the position of the parties on June 27, 1916, when the contract was made, as we are required to do by Section 717, L. O. L., we must know by the laws of nature and the fruit season in this country that there was then no present crop of prunes of the season of 1916, dried and ready for shipment, even if the seller had an orchard upon which potential property in such fruit could be predicated. The testimony shows without dispute that at that time Rust had no prunes of any kind and no orchard or contract by means of which he could expect to acquire them. It is common sense that a man cannot pres-

ently convey title to property which is not in existence. It is true that he may make a contract for future delivery, although he has no property of the kind on hand when the stipulation is made. The authorities, however, are practically unanimous that such a covenant is executory in its nature, notwithstanding it contains present words of selling and buying.

6–9. In the present instance the writing begins with the recital that the seller "has sold" and the buyer "has bought" the 1916 crop of prunes, the output of Rust's drier. It is also said in the body of the instrument: "This contract is understood by both parties to constitute an absolute sale, but until the delivery has been completed the seller agrees to and does assume all risk of loss or damage." This language is no stronger than that above mentioned and adds nothing to its force. It does not amount, in effect, to any more than saying that when the terms of the writing have all been fulfilled, the result will be an absolute sale. When we consider the whole instrument together we find that in it there are dependent covenants, the performance of which must be synchronous and that neither party can put the other in default until he has himself fully performed or tendered performance of what he is to do on his part. This doctrine is illustrated in such cases as *Lewis* v. *Craft,* 39 Or. 305 (64 Pac. 809); *Longfellow* v. *Huffman,* 49 Or. 486, 490 (90 Pac. 907). The principle that at law the seller cannot presently pass title to property which is not in existence, either actually or potentially, or which he must hereafter acquire, is enunciated in the cases of *Fonville* v. *Casey,* 5 N. C. 389 (4 Am. Dec. 559); *Moody* v. *Wright,* 13 Met. (54 Mass.) 17 (46 Am. Dec. 706); and *Dickey* v. *Waldo,* 97 Mich. 255 (56 N. W. 608, 23 L. R. A. 449, and notes). It is argued by the plaintiffs

that although title did not pass at the date of the contract on account of the property not being then in existence, yet afterward when the seller did acquire the fruit of the kind and quality prescribed by the agreement, the ownership then automatically passed to the plaintiffs in manner and form sufficient to support replevin. The rule supported by the authorities quoted, as well as by most other precedents, however, is that in order really to pass the title, as distinguished from rights under an executory contract, when the property has actually come into existence and possession of the seller, there must be some further act of the parties amounting to a performance in that feature of the covenant which hitherto has been executory. The plaintiffs and Rust entered into an agreement the working out of which was designed to pass the title to personal property from the latter to the former. The terms of that process are described in their writing. They expressly say that the "buyer agrees to pay for said crop at the price named when delivery is completed." Without respect to the general property in the prunes, in whomsoever that may be, as against the action for mere possession of them Rust would be entitled to hold the property under this contract until plaintiffs had performed their concurrent covenant of paying at the time of delivery. This court has several times held that a claim under an executory contract will not support replevin by the buyer from the seller. This is taught in *Hubler* v. *Gaston,* 9 Or. 66 (42 Am. Rep. 794); *Rosenthal Bros.* v. *Kahn Bros.,* 19 Or. 571, 573 (24 Pac. 989); *Hamilton* v. *Gordon,* 22 Or. 557, 558 (30 Pac. 495); *Backhaus* v. *Buells,* 43 Or. 558, 569 (72 Pac. 976, 73 Pac. 342), and other cases. The rigor of this rule of law is somewhat tempered under certain circumstances in equity, where chattels

are mortgaged in advance of their acquisition. The court sitting in chancery will construe the mortgage as pledging the property the instant it subsequently comes into the mortgagor's ownership, by imputing to him the act necessary to that result, on the ground that equity will consider that as done which ought to have been done. The rule is different at law where the buyer is remitted to his action against the recreant seller for damages for his breach of his executory contract to transfer the title and possession of the goods.

10. There is no situation disclosed in the testimony which would support replevin by the plaintiffs as against Rust. It is not pretended that they ever performed their covenants. At best they only advanced to him a part of the purchase price and there is nothing in the testimony or pleadings indicating that Rust waived performance of their concurrent covenant to pay at the time of delivery, so that irrespective of where the general property lies the right to immediate possession has never vested in plaintiffs. They are not in any better plight in respect to the defendant. These conclusions dispose of the assignment of error to the effect that the court was wrong in refusing to direct a verdict for the plaintiffs.

11. Referring to the statement in the answer that the defendant was entitled to receive from his principal a compensation of one cent per pound for his services in buying prunes for their account and preparing them for shipment plaintiffs asked the court to charge the jury thus, and predicate error on the refusal of their request:

"You are further instructed that under the pleadings of this case the only damages you can assess against the plaintiffs in the event you should find for

defendant, is the sum of one cent per pound for the prunes taken from defendant, as defendant pleads the property right in the prunes to have been in John H. Leslie Company, of Chicago, Illinois, and defendant's interest in said prunes to have been only a contract to process them at the stipulated price of one cent per pound."

In actions for the recovery of specified personal property, if it has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury is required to assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property: Section 153, L. O. L. A distinction, therefore, must be drawn between the value of the property and the damages for its detention. The instruction as framed is in some degree misleading and argumentative for the reason that it declares that the only interest the defendant has in the property is the stipulated price of one cent per pound. Many cases are cited in support of the plaintiffs' contention to the effect that when either party claims only a limited estate in the subject of the action, the alternative judgment in his favor must be for the value of the special title. Without exception, however, those cases are between the general owner of the property and the one claiming a special estate therein, as, for instance, between mortgagor and mortgagee, or bailor and bailee, and the like, or their successors in interest. They do not apply to cases like the present, where each is claiming the whole title and between whom there is no privity. The defendant had the right to show that

he would have made one cent per pound out of his connection with the property if he had been allowed to proceed, and this for the purpose of proving his damages. The general value of the property is quite another matter. If he was entitled to the possession of the property in its entirety, he was also entitled to a judgment for its value in case possession could not be returned to him. That a bailee may maintain replevin against one not entitled to possession and who has no title thereto is taught in *Lewis* v. *Birdsey,* 19 Or. 164 (26 Pac. 623); *Danielson* v. *Roberts,* 44 Or. 108 (74 Pac. 913, 102 Am. St. Rep. 627, 65 L. R. A. 526); *Casto* v. *Murray,* 47 Or. 57 (81 Pac. 388, 883); *Taylor* v. *Brown,* 49 Or. 423 (90 Pac. 673). This is not in derogation of the doctrine of *McNeff* v. *Southern Pac. Co.,* 61 Or. 22 (120 Pac. 6), where it was decided that a defendant holding a special property was entitled to an alternative judgment only for the value of his estate in the chattels. That case was between the successors in interest of the general owner of the property on one hand and one claiming a special estate therein in the other. Here, both parties claim the general property in the fruit, the firm in its own right and the other as bailee for a principal who is a stranger to the plaintiffs and not affected by any privity of contract or estate with them. Considered, therefore, as a request to charge the jury that the assessed value of the property, in case the same could not be returned, must be only one cent per pound, the instruction was clearly erroneous under the pleadings and evidence.

12. Considered as a precept for the measure of damages, the giving of this instruction would have been harmful to the plaintiffs themselves for it would allow a recovery of the gross sum of one cent

per pound as damages without any deduction for the necessary expense and labor of treating the prunes and packing them for shipment to Leslie & Company. In that sense, the error of refusal was harmless so far as the plaintiffs are concerned.

13. The court gave an instruction relating to the estoppel mentioned in the answer. Whatever may be said of the sufficiency of the pleadings or the merits of the instructions in that aspect of the controversy the result would be the same because it depends upon the construction given to the contract, the legal effect of which was at least to leave possessory rights in Rust and not in the plaintiffs in any event. The outcome of the case would be the same whether the estoppel was pleaded or proved or not. Hence, the error, if any, in giving the instruction on that subject is negligible. The most that the plaintiffs have shown is an executory contract on the part of Rust to sell and deliver prunes. For the default of Rust in failing to comply with his contract, if there was such a failure, the only remedy the plaintiffs have, if any, is by an action for damages for the breach of the executory contract so far as this record discloses.

These considerations lead to an affirmance of the judgment. AFFIRMED.

McBRIDE, C. J., BENSON and HARRIS, JJ., concur.

Argued April 17, reversed May 14, rehearing denied June 11, 1918.

STATE v. FORD.*

(172 Pac. 802.)

Forgery—False Recital in Deed.

1. False recital in deed that E., who signed deed with defendant, was his wife, deed purporting to be deed of said parties, and being executed by E. under the name by which she was known, did not constitute forgery under Section 1996, L. O. L., providing that if any person shall with intent to injure or defraud, falsely make, alter, forge, or counterfeit any deed, or shall with such intent knowingly utter or publish as true or genuine any such false, altered, forged, or counterfeited writing, shall be punished, etc.; there being no intent to utter deed as that of others.

Names—Common-law Right to Change.

2. Section 7093, L. O. L., empowering the County Court to hear and determine applications for change of names, does not abrogate the common-law right of a person to change his name.

[As to right of individual to change his name, see note in Ann. Cas. 1914D, 427.]

Evidence—Presumption as to Laws of Sister State—Common Law.

3. In the absence of evidence, it must be assumed that the common-law right of a person to change her name obtains in a sister state.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2.

The defendant was convicted of the crime of forging a deed in favor of J. D. McKinnon, May 12, 1914. The conviction is based on the contention of the state that he caused the deed in question to be signed by Elizabeth G. Frary, who signed her name as Elizabeth G. Ford and who is described in the body of the deed as appellant's wife. The state claims that she was not his wife and that he had a wife living at the date of the deed. The state also claims that the deed was executed with intent to injure and defraud.

*On the right to change name, see notes in 14 L. R. A. 692; L. R. A. 1915D, 982. REPORTER.

It appears that appellant went to Alaska in 1898; that he there met Caroline C. S. Vogt, a young woman about his own age. While living in the neighborhood of Eagle City they agreed to marry. The state's evidence is to the effect that there was no clergyman or officer authorized to celebrate a marriage to be found in that part of the country. On December 24, 1898, they appeared before J. F. Hobbs, a notary public residing at Eagle City, and entered into a contract of marriage. A certificate to this effect was issued by the notary under his official seal and there is evidence that the notary, who was also an attorney at law, advised them that a contract of marriage so entered into was valid and lawful. The parties to the contract lived together as man and wife for ten years thereafter, visiting appellant's relatives in Michigan and North Dakota and residing in several different places. They were everywhere treated as man and wife, appellant repeatedly acknowledging the relation. Four children were born to them, one of whom, a daughter twelve years of age, testified at the trial.

In 1908 appellant ceased to live with Caroline C. S. Ford, but he continued to contribute to her support until 1914. In 1907 appellant began living with Elizabeth G. Frary. He entered into a written contract of marriage with her, but there was no ceremony performed until after the execution of the deed on which this prosecution is based. Appellant from and after 1908 lived openly with Elizabeth G. Frary, introduced her to a number of persons as his wife and she went under the name of Elizabeth G. Ford.

In 1914 appellant associated himself with J. D. McKinnon and F. C. Sharkey for the purchase of livestock for the Alaska market. McKinnon advanced $15,000 to finance the enterprise and the parties

agreed to share profits and losses equally. For the purpose of indemnifying McKinnon for any loss chargeable to appellant the deed in question was executed. It purported to be a warranty deed but was in effect a mortgage. REVERSED.

For appellant there was a brief with oral arguments by *Mr. John C. McCue* and *Mr. William A. Williams.*

For the State there was a brief over the names of *Mr. Walter H. Evans,* District Attorney, *Mr. Charles C. Hindman,* Deputy District Attorney, and *Mr. John A. Collier,* Deputy District Attorney, with an oral argument by *Mr. Hindman.*

McCAMANT, J.—1. Counsel for the respective parties have lavished a wealth of learning and research on the question of the validity of the contract marriage celebrated December 24, 1898, at Eagle City, Alaska. We shall assume without deciding that this marriage was valid. Can it be said on this assumption that appellant forged the deed set out in the indictment?

Section 1996, L. O. L., in so far as it is material here is as follows:

"If any person shall, with intent to injure or defraud any one, falsely make, alter, forge, or counterfeit any * * contract, * * deed, * * or shall, with such intent, knowingly utter or publish as true or genuine any such false, altered, forged, or counterfeited * * writing * * such person upon conviction thereof, shall be punished. * * "

This statute has been construed by the court in *State* v. *Wheeler,* 20 Or. 192, 195 (25 Pac. 394, 23 Am. St. Rep. 119, 10 L. R. A. 779). It is there held that

"the essential elements of the crime are: (1) a false making of some instrument in writing; (2) a fraudu-

lent intent; (3) an instrument apparently capable of effecting a fraud."

Assuming that Caroline C. S. Ford was appellant's wife May 12, 1914, when the deed was executed, the deed contained a false recital in that it described Elizabeth G. Ford as the wife of H. N. Ford. The deed did not purport to be the deed of Caroline C. S. Ford, or of anyone else than H. N. Ford and Elizabeth G. Ford, who signed it.

In his scholarly opinion in *State* v. *Wheeler,* 20 Or. 192 (25 Pac. 394, 23 Am. St. Rep. 119, 10 L. R. A. 779), Mr. Justice BEAN says:

"The term 'falsely', as applied to making a promissory note in order to constitute forgery has reference not to the contract or tenor of the instrument, or the fact stated in the writing, because a note or writing containing a true statement may be forged or counterfeited as well as any other; but it implies that the writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains. The note must in itself be false, not genuine, a counterfeit, and not the true instrument which it purports to be."

We think that there can be no doubt of the correctness of the principles so announced. The genuineness of an instrument is not dependent on the truthfulness of its recitals. A deed may falsely recite the area of the land conveyed, but if it is executed by the true parties it is still a genuine as distinguished from a false, forged or counterfeited instrument.

A deed containing such false recital may form the basis for some other criminal charge, but if it is executed by the parties purporting to convey or encumber it is not a forgery.

It is said by the Iowa court in *Loser* v. *Plainfield Savings Bank,* 149 Iowa, 672 (128 N. W. 1101, 31 L. R. A. (N. S.) 1112, 1114, 1115):

"There is no such thing as a 'legal name' of an individual in the sense that he may not lawfully adopt or acquire another, and lawfully do business under the substituted appellation. In the absence of any restrictive statute, it is the common-law right of a person to change his name, or he may by general usage or habit acquire a name notwithstanding it differs from the one given him in infancy. A man's name for all practical and legal purposes is the name by which he is known and called in the community where he lives and is best known."

This principle is also taught by *Smith* v. *United States Casualty Co.,* 197 N. Y. 420 (90 N. E. 947, 18 Ann. Cas. 701, 26 L. R. A. (N. S.) 1167); *Laflin & Rand Co.* v. *Steytler,* 146 Pa. St. 434 (23 Atl. 215, 14 L. R. A. 690, 695); *Roberts* v. *Mosier,* 35 Okl. 691 (132 Pac. 678, Ann. Cas. 1914D, 423); 19 R. C. L. 1332, 1333.

2, 3. It is not believed that Section 7093, L. O. L., abrogates the common-law principle announced by the foregoing authorities. This section of the Code empowers the County Court to hear and determine applications for the change of names. In 1852 Pennsylvania enacted a similar statute, found in the Session Laws for that year at page 301. It was held by the Supreme Court of Pennsylvania that the act "was in affirmance and aid of the common law, to make a definite point of time at which a change shall take effect," and that notwithstanding the statute a party can acquire by custom the right to use a certain name: *Laflin & Rand Co.* v. *Steytler,* 146 Pa. St. 434 (23 Atl. 215, 14 L. R. A. 690, 695). In any event we must assume in the absence of evidence on the subject that the common-law rule obtains in Illinois and the other states in which

appellant and Elizabeth G. Frary had resided from 1908 to 1914. During all of that time the latter had been known as Elizabeth G. Ford. The deed in question therefore was executed by her under the name by which she was known. In *State* v. *Wheeler,* 20 Or. 192 (25 Pac. 394, 23 Am. St. Rep. 119, 10 L. R. A. 779), Mr. Justice BEAN says:

"When a party signs a name not his own, but one which he has adopted, using it without the intent to deceive as to the identity of the person signing it, it is not a forgery."

The state cites *Commonwealth* v. *Foster,* 114 Mass. 311, 320 (19 Am. Rep. 353), *State* v. *Farrell,* 82 Iowa, 553, 558 (48 N. W. 940), and *Barfield* v. *State,* 29 Ga. 127, 131 (74 Am. Dec. 49). In all these cases the parties signing the instruments used their true names, but the instruments were signed with intent to be used as the contracts of other parties whose names were identical. In each of these cases there was a false making. The instrument was signed by one party with intent that it be uttered as that of another. We find no evidence of such intent in the instant case. At the date of the deed appellant was insisting that Elizabeth G. Ford or Elizabeth G. Frary was his wife and that he had never married Caroline C. S. Ford. There is no evidence of intention to utter the instrument as the deed of Caroline C. S. Ford. The deed purported to be what it was in fact, the deed of H. N. Ford and Elizabeth G. Ford.

The case of *State* v. *Wheeler,* 20 Or. 192 (25 Pac. 394, 23 Am. St. Rep. 119, 10 L. R. A. 779), does not stand alone in holding that a false recital of fact does not constitute forgery. The false recital that Elizabeth G. Ford was the wife of H. N. Ford did not under the authorities constitute a false making of the instru-

ment. In *United States* v. *Wentworth,* 11 Fed. 52, 55, it is said:

"To falsely make an affidavit is one thing; to make a false affidavit is another. A person may falsely make an affidavit, every sentence of which may be true in fact. Or he may actually make an affidavit, every sentence of which shall be false. It is the 'false making' which the statute makes an offense, and this is forgery as described in all the elementary books."

In State v. Young, 46 N. H. 266 (88 Am. Dec. 212, 216), the court says:

"A man may make a statement in writing of a certain transaction, and may represent and assert ever so strongly that his statement is true, but if it should prove that by mistake he is in error, and that his statement is entirely wrong, that could not be forgery; and suppose we go further, and admit that the statement was designedly false when made, and so made for the purpose of defrauding someone, it does not alter the case: it is not forgery. The paper is just what it purports to be, it is the statement of the man that made it; it is a true writing or paper, though the statement it contains may be false."

To the same effect are *United States* v. *Moore,* 60 Fed. 738, 739; *United States* v. *Glasener,* 81 Fed. 566–568; *United States* v. *Cameron,* 3 Dak. 132 (13 N. W. 561); *Territory* v. *Gutierrez,* 13 N. M. 312 (84 Pac. 525, 5 L. R. A. (N. S.) 375); 12 R. C. L. 144.

"Where one executes and issues an instrument purporting on its face to be executed by him as the agent of a principal therein named, he is not guilty of forgery, even though he has in fact no authority from such principal to execute the same": *Mann* v. *People,* 15 Hun (N. Y.), 155, 169; *People* v. *Bendit,* 111 Cal. 274 (43 Pac. 901, 52 Am. St. Rep. 186, 31 L. R. A. 831); *State* v. *Taylor,* 46 La. Ann. 1332 (16 South. 190, 49

Am. St. Rep. 351, 25 L. R. A. 591); *State* v. *Willson*, 28 Minn. 52 (9 N. W. 28); *In re Tully*, 20 Fed. 812.

We can make no distinction between a false recital of agency and a false recital of the marriage relation.

The prosecution failed to prove a false making and the Circuit Court erred in denying appellant's motion for a directed verdict. The judgment is therefore reversed. REVERSED.

McBRIDE, C. J., and MOORE and BEAN, JJ., concur.

Argued May 22, affirmed June 11, 1918.

ARSTILL *v.* HARE.

(173 Pac. 571.)

Highways—Establishment—Preliminary Survey—Presumption.

1. In proceedings to review action of County Court in establishing a county road, where there was no record of a preliminary survey, it will be presumed to have been made; there being no evidence to the contrary.

Evidence—Presumptions—Official Duty.

2. In establishing a county road, a preliminary survey being required by statute will be presumed to have been made under the presumption that official duty has been regularly performed.

Highways—Establishment—Scope of Review—Record.

3. The sufficiency of field-notes, plats and profiles will not be considered on proceedings to review the action of a County Court in establishing a county road; the record showing the filing of such field-notes, plats, and profiles.

Highways—Establishment—Viewers—Appointment—Irregularities.

4. Where County Court in establishing county road reject the first report of the board of viewers, and, making a new order for viewing, reappoint the same viewers, the court's failure to make an order dismissing the viewers before reappointing them is a mere irregularity and harmless.

Highways—Establishment—Viewers—Report—Damages.

5. Where the report of viewers appointed by County Court in the establishment of county road upon the question of damages follows the language of Section 6290, L. O. L., providing for the assessment

of damages in the establishment of such roads, the County Court did not exceed its jurisdiction in its approval thereof.

Highways—Establishment—Record—Damages—Viewers.

6. In proceedings to review action of County Court in establishing county road, where the record is silent on the methods adopted by viewers in ascertaining damages, the court cannot pass on question of whether allowance was made for land taken.

From Tillamook: GEORGE R. BAGLEY, Judge.

Department 2.

This is a proceeding to review the action of the County Court of Tillamook County in establishing a county road. The Circuit Court dismissed the writ and the petitioners appeal. AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Webster Holmes.*

For respondents there was a brief over the names of *Mr. T. H. Goyne*, District Attorney, and *Mr. Sidney S. Johnson.*

BENSON, J.—1, 2. The first contention presented by appellants is that no preliminary survey was made of the proposed highway as required by statute. This objection is based upon the fact that the record is silent upon the subject. There is no statute requiring a record of such preliminary survey and in the absence of evidence the presumption that official duty has been regularly performed, must prevail.

3. It is next urged that no sufficient field-notes, plats or profiles were filed as required by law. The record shows affirmatively the filing of field-notes, plats and profiles, and the question of their sufficiency cannot be investigated in a proceeding of this nature: *Garnsey* v. *County Court,* 33 Or. 201 (54 Pac. 539, 1089).

4. The third point raised by appellants is that the County Court, having rejected the first report of the board of viewers, and without making an order discharging them, reappointed the same parties, making a new order for viewing, surveying, etc. This at most, could be no more than a mere irregularity, and not substantial error.

5, 6. Finally it is urged that the County Court exceeded its jurisdiction in approving the report of the viewers upon the question of damages. The report of the viewers upon this subject follows the language of the statute then governing the matter, Section 6290, L. O. L., and the record is silent as to the manner in which they arrived at the result. Counsel for petitioners asserts that they did not make any allowance for the land actually taken, but we are unable to find anything in the record upon which to base an inference as to the details considered by the viewers in determining the amount of damage.

We find no error in the record, and the judgment is affirmed. AFFIRMED.

BEAN, HARRIS and MOORE, JJ., concur.

Submitted on motion to dismiss May 14, appeal dismissed June 11, 1918.

SHERMAN *v.* SHERMAN.

(173 Pac. 572.)

Divorce—Right to Appeal—Acceptance of Benefits Under Decree Appealed from.

1. In divorce proceedings, where decree was rendered for the husband, and the wife was allowed a monthly sum as alimony, she cannot, after accepting such allowance, appeal from the whole decree, the allowance of alimony being an integral part thereof.

From Multnomah: ROBERT TUCKER, Judge.

In Banc.

The plaintiff sued the defendant for a divorce. Issue was joined on the complaint and new matter in the answer. The court heard the testimony and on November 16, 1917, dissolved the marriage contract and granted the plaintiff an absolute divorce from the defendant. In settlement of their property rights the court decreed to the defendant an absolute title to all of certain platted property in various cities in Oregon and elsewhere released from any claim to the same on the part of the plaintiff, and to the plaintiff certain acreage free from any claim thereto on the part of the defendant, and finally ordered that the plaintiff pay to the defendant $40 per month as alimony, commencing from the date of the entry of the decree. The defendant appealed and the plaintiff moved to dismiss the same. APPEAL DISMISSED.

Mr. George W. Caldwell, for the motion to dismiss appeal.

Mr. William S. Nash and *Mr. Sidney J. Graham, contra.*

PER CURIAM.—It appears by the abstract that the defendant served her notice of appeal January 15, 1918. The affidavit of the plaintiff in support of his motion to dismiss the appeal is to the effect that the defendant accepted two payments of alimony before she served her notice of appeal and that since then, up to and including April 1, 1918, she has accepted from the defendant the monthly payments of $40 adjudged by the decree and accruing subsequent to its

rendition. The plaintiff also states in his affidavit that since the decree the defendant has assumed the exclusive management and control of the real property allotted to her. The defendant admits that she received the installments of alimony both before and after serving her notice of appeal and that she has exercised no more dominion over the realty since the decree than she did before it was rendered. It is plain that the defendant received the money solely on account of the decree. As she was the holder of the legal title to the realty previous to the institution of the suit and in equity at least a tenant in common of the same, it is possible that her subsequent management of the same did not prejudice her appeal, but this cannot be said of her acceptance of alimony.

It is true that under Section 7040, L. O. L., et seq., a wife, in a proper proceeding, may procure a decree requiring her husband to provide for her support and it has been held in such cases that she must show that she is living apart from her husband without her fault: *Fowler* v. *Fowler,* 31 Or. 65 (49 Pac. 589); *Ivanhoe* v. *Ivanhoe,* 68 Or. 297 (136 Pac. 21, 49 L. R. A. (N. S.) 86). Under proper averments this procedure might avail the defendant in her contention stated in her affidavit to the effect that the money is necessary for her support, but that question is not presented on the record before us.

1. The allowance of the alimony of $40 per month was an integral part of the decree and is involved in the appeal from the whole of that adjudication. It does not present a case in which the court can say as of course that the defendant is entitled to that much or any allowance at all events, whether the case should be affirmed or reversed. The cases cited by the defendant in support of her right to appeal after having

accepted the alimony allotted to her are instances where the court could say from the record as a matter of law that the benefit awarded to and accepted by the appellant belonged to him absolutely in every view of the case, beyond the power of the appellate court to change the part accepted. There is no such condition in this case. It is well settled in this state that a party cannot accept the benefits of part of a decree or judgment and appeal from the whole of it. Yet this is what the defendant has sought to accomplish. The authorities on this point are collated and reviewed by Mr. Justice BENSON in *Portland* v. *Schmid,* 82 Or. 465 (161 Pac. 560).

The motion to dismiss the appeal must be allowed.

APPEAL DISMISSED.

Submitted on briefs May 14, reversed and remanded June 11, 1918.

HOLDEN *v.* GULSTROM.

(173 Pac. 672.)

Landlord and Tenant—Lease—Dependent Covenants.

1. A stipulation in a lease that lessee shall clear the land, and the further stipulation that lessor shall assist in the clearing by furnishing a man and team, are dependent covenants.

Landlord and Tenant—Lease—Performance of Services.

2. Where part of the rental for the first year of a five-year lease was the tenant's agreement to do work in clearing land, such work, no time for performing it being specified in the lease, was due to be performed during the first year, and not within any reasonable time after the tenant assumed possession.

Pleading—Amendments.

3. Courts should be exceedingly liberal in allowing amendments which are obviously in furtherance of justice, especially in regard to defendants, for while plaintiffs, if their pleadings are insufficient, may dismiss and begin again, defendants have no such opportunity.

[As to how far amendments are allowable that vary or alter cause of action, see notes in 34 **Am. Dec.** 158; 51 **Am. St. Rep.** 414.]

From Tillamook: GEORGE R. BAGLEY, Judge.

In Banc.

This was an action for forcible detainer. It was originally brought in Justice's Court and appealed to the Circuit Court, where a trial was had resulting in a verdict and judgment for defendant, from which judgment plaintiffs appeal.

The controversy arose from the alleged breach of a lease which, by its terms, was to extend over a period of five years at a yearly rental therein specified. The lease became effective November 6, 1917, and contained among others the following stipulations:

"The consideration of the said lease shall be the conditions herein named and the following rental to be paid for the respective years, to wit:

"The rental for the first year shall be the sum of one thousand dollars ($1000.00) which is paid on the execution of this lease, and receipt whereof is hereby acknowledged; and in addition thereto as a part of the said rental, the lessee agrees to do certain work in the way of clearing and improving the said premises, as agreed upon between the parties, and which may be designated as follows, to wit:

"Lessee agrees to pick up and pile and burn all the logs and chunks on the west portion of the premises herein first described, and the lessor agrees to furnish a team and a man to assist the lessee in piling the large logs and hauling certain of them away from the premises. * *

"In case the lessee shall violate any of the covenants or agreements of this lease, or shall fail to pay any of the rentals at the time the same become due, then the lessors may in their discretion declare this lease at an end and null and void and may thereupon take possession of the said premises and leased personal property and the whole thereof, and the lessee covenants and agrees in event of failure to perform any of

the conditions or covenants herein mentioned that he will deliver up possession of all the said leased property to the lessors upon their demand."

The breach of covenant assigned in the complaint was the failure of the defendant before November 10, 1917, to do the clearing specified in the paragraph first above quoted.

Defendant answered admitting his failure to remove the logs and brush as required, but alleged that such failure was occasioned by the neglect and refusal of plaintiffs to furnish a team and man to assist in removing, hauling and piling the logs, as stipulated in the lease. A motion to strike out this defense was overruled. The plaintiffs objected to the testimony offered sustaining the defense, on the theory that the covenant to clear the land and the covenant of the lessors to furnish a man and team to assist, were independent covenants, and that defendant's remedy for a failure by the lessors in the respect mentioned, could not excuse the lessee from his obligation to pay rent and otherwise perform the labor which formed a part of the consideration for the lease.

Plaintiffs also objected to the following instruction, the giving of which was assigned as error:

"The agreement of the parties under this lease, however, does not provide any time in which the defendant lessee, has to pick up, pile and burn the logs and chunks on the west portion of the first tract of land described in the lease, and the law, therefore supplies this hiatus in the agreement and provides that that must be done within a reasonable time after the lessee assumed possession of the premises in which to perform the work, and that is for your determination."

There was evidence tending to show that defendant was ready and willing to clear the land, as stipulated

in the lease, but that plaintiffs failed and refused to furnish the man and team, as provided for in that instrument. The court in substance instructed the jury that if plaintiffs refused to furnish the man and team, said refusal excused nonperformance by defendant of the covenant to clear the lands. The evidence as to such refusal is contradictory.

REVERSED AND REMANDED.

For appellants there was a brief submitted over the name of *Messrs. Johnson & Handley.*

For respondent there was a brief prepared and submitted by *Mr. H. T. Botts* and *Mr. C. W. Talmage.*

McBRIDE, C. J.—1. The first contention of appellants is, that the court erred in instructing the jury that the failure or refusal of the plaintiffs to furnish a man and team to haul the large logs off the land to be cleared, excused nonperformance by defendant of his covenant to clear. Both upon principle and authority we think the instruction was correct. Assuming, as we must after verdict, that the testimony of defendant was true, the plaintiffs are placed in the position of saying:

"It is true that we agreed to furnish a man and team to assist in clearing the land, and it is also true that we refused your request to furnish them upon demand, but your agreement to clear was an independent covenant and because you have failed to perform your part of the agreement, we have the right to declare your lease perfected and evict you."

This is the plain bald proposition and it is so inequitable as to at once suggest its fallacy. It must be borne in mind that this is not an action to recover rent, as in the cases cited by plaintiffs, but in substance

it is an action to enforce a forfeiture and it has crystallized into a maxim that the law abhors forfeitures, and it will not enforce one where he who claims it is also at fault. We are of the opinion that the stipulation in the lease that defendant shall clear the land, and the further stipulation that plaintiffs shall assist in the clearing by furnishing a man and team, are dependent covenants.

We are aware that this proposition is open to controversy. The line of demarcation between independent and dependent covenants is not always clearly defined. As said in Cyc., Vol. 24, p. 918:

"Covenants are to be construed as dependent or independent according to the intention of the parties and the good sense of the case. Technical words should give way to such intention. Some of the cases, however, lay down the rule that covenants in a lease will be considered and held as dependent conditions, to be performed by the respective parties, unless it fairly appears from the nature of the covenants they intended them to be independent."

In *Sigmund* v. *Newspaper Co.*, 82 Ill. App. 178, there was a covenant on the part of the landlord to decorate and repair the leased building. In an action for rent it was held that the covenant to pay rent and the covenant to decorate and repair were mutual and interdependent covenants. There was a like holding in *Lunn* v. *Gage*, 37 Ill. 20 (87 Am. Dec. 233). There is urgent reason for holding in cases like the present that the covenant to clear the land and the covenant of the lessor to furnish a man and team to assist in doing the work, are dependent covenants. It is frequently, indeed more frequent than otherwise, the case that a farm renter in this part of the country is a man of small means and not readily able to purchase a team

or to hire extra labor. To one so situated the offer to allow him to pay part of his rent by clearing, with the additional stipulation to furnish him the necessary assistance and the indispensable team without expense to him, might be the very consideration that would induce him to become a party to the lease; and to hold that the landlord could refuse to furnish the assistance and the team, and that the lessee would be compelled to employ a man and either purchase or hire a team or forfeit the lease upon which he had paid a thousand dollars in advance, would be a gross injustice which no court should sanction. This is one of the many reasons which have led to the establishment of the rule that courts will, when the common sense of the situation seems to justify it, hold covenants of this character to be dependent rather than otherwise.

Said Mr. Justice THOMPSON in *Bank of Columbia* v. *Hagner,* 1 Pet. (26 U. S.) 455, 464 (7 L. Ed. 219):

"Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent, yet it is evident the inclination of the courts has strongly favored the latter construction as being obviously the most just."

While the case there being discussed did not arise upon an alleged breach of the covenants in a lease, it is difficult to see why the same rule does not apply especially where the action, as in this case, is to enforce a forfeiture of a lease and not an action to recover rent, or for damages for breach of covenant, in which latter case the lessee, under our liberal system of pleading, might be permitted to counterclaim for a breach of the covenant to furnish assistance in clear-

ing the land, if by such failure he lost the use of the land for pasture or for hay.

2. We are not able to agree with the learned judge as to the propriety of the instruction excepted to. Taking the lease by its four corners we think its evident intent is that the work of clearing the first tract was to be performed during the year beginning November 10, 1916, and ending November 10, 1917. This is indicated by that clause of the lease providing for the rental for the second year, which, after providing for the rent to be paid otherwise than in clearing, continues:

"And in addition to this rental for the second year of the lease, the lessee agrees to pick up, pile and clear the second premises hereinbefore mentioned, in the same manner as he is to clear and improve the other premises as hereinbefore mentioned, except that the lessors shall not be required to furnish any assistance to the lessee unless the lessee elects to do the work during the winter of 1916–17."

It was evidently in the contemplation of the parties that the work upon the first tract should be completed during the winter of 1916–17, and if the lessee should choose to "make one bite of the cherry" and clean up both tracts during that year instead of waiting until the rental year of 1917–18, the lessors were to furnish assistance to complete both tasks. The clearing was a part of the rent to be paid for the first year, and where the lease fixes a yearly rent and makes no provision for its payment, it must be paid at the end of the year just the same as if the agreement was to pay in money or in a proportion of the crops. In the latter case the authorities hold that the rent is payable when the crop is harvested or within a reasonable time thereafter, and that the landlord may distrain for his share without waiting until the end of the rental year: *Toler* v.

Seabrook, Admr., 39 Ga. 14; *Brown* v. *Adams*, 35 Tex. 447.

3. We hold that the covenant to clear the land was, by the terms of the lease, to be performed within the rental year, and that it was error to instruct the jury that it was sufficient if the defendant should perform within a reasonable time since this would leave the jury free to say that any time within the limits of the five years which the lease covered was reasonable, but we repeat that the defendant was not bound to perform his part of the agreement in the face of the refusal of plaintiff to furnish him the assistance which his contract bound him to provide.

We do not think the amendment to the answer allowed in the Circuit Court was so foreign to the defense allowed in the Justice's Court as to substantially change the cause of defense tried there. Courts should be exceedingly liberal in allowing amendments which are obviously in furtherance of justice, and this should be especially the rule in regard to defendants, for while plaintiffs—if their pleadings are insufficient—may dismiss and begin again a defendant has no such opportunity.

For the error in the instruction above noted the judgment will be reversed and the cause remanded to the court below for a new trial.

REVERSED AND REMANDED.

Argued May 28, affirmed June 11, 1918.

BARNES v. MASSACHUSETTS BONDING CO.

(172 Pac. 95.)

Statutes—Construction.

1. Effect must be given to all the terms of a general statute, and where general terms or expressions in one part are inconsistent with more specific or particular provisions elsewhere, the particular provisions will be given effect as clearer and more definite expressions of the legislative will.

[As to rules of construction of statutes, see note in 12 Am. St. Rep. 826.]

Limitations of Actions—Liability Created by Statute—Liability for Wrongful Levy—Statutes.

2. Under Sections 6, 7, L. O. L., providing that an action on a liability created by statute, other than a penalty or forfeiture, must be commenced within six years, and that an action against a sheriff, coroner or constable upon a liability incurred by the doing of an act in his official capacity, or by the omission of an official duty, including the nonpayment of money collected on execution, must be commenced within three years, where a sheriff, by virtue of an execution, levied on property of a stranger to the writ, rendering his surety liable to such stranger pursuant to Section 348, L. O. L., the latter was bound to bring her action against the sheriff and his surety within three years; the substance of the statute being that in general a statutory liability may be enforced within six years, but where the accountability of a sheriff, coroner or constable is involved, the action must be commenced within three years.

Limitation of Actions—Bar of Action Against Principal as Affecting Surety.

3. In relation to the matter of limitations, the sheriff's surety occupied no worse position than his principal, and the action against him was likewise barred in three years.

From Marion: PERCY R. KELLY, Judge.

Department 1.

The defendant Esch was the sheriff of Marion County. The Massachusetts Bonding & Insurance Company was a surety on his official bond, which was conditioned, among other things, for him well and faithfully to perform the duties of the office. Equipped with an execution issued upon a judgment against L. S. Barnes in favor of A. B. Spencer, the sheriff

levied upon and sold some shares of stock which the plaintiff here claims as her own. Upon these facts she began an action against him and his surety to recover damages for the levy and sale. The court sustained a demurrer to the complaint and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Grant Corby.*

For respondents there was a brief over the names of *Mr. Oscar Hayter* and *Mr. Woodson T. Slater,* with an oral argument by *Mr. Hayter.*

BURNETT, J.—The ground of demurrer relied upon in the argument before us was "that the said action was not commenced within the time limited by the Code of Civil Procedure of the State of Oregon, to wit, within the time limited by Section 7 of Lord's Oregon Laws." Under Section 348, L. O. L., the official undertaking of a public officer to the state or to any county is deemed a security to all persons severally for the official delinquencies against which it is intended to provide. Claiming the benefit of this section, the plaintiff has instituted her action and the question is whether she began it in time.

The sale complained of occurred September 16, 1913. It is conceded that the action was commenced more than three years and less than six years after that date. Prescribing the periods within which actions at law shall be commenced, Sections 6 and 7 of Lord's Oregon Laws, so far as applicable, read thus:

Section 6. "Within six years * * :

"2. An action upon a liability created by statute other than a penalty or forfeiture."

Section 7. "Within three years * * :

"1. An action against a sheriff, coroner or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office; or by the omission of an official duty; including the nonpayment of money collected upon an execution. * * "

In the features here mentioned these provisions are part of a single statute, the act of October 11, 1862, to provide a Code of Civil Procedure.

1. The rule of construction of a statute is that effect must be given to all of its terms and—

"where general terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provisions will be given effect as clearer and more definite expressions of the legislative will": 36 Cyc. 1130.

The rule is thus stated in *Crane* v. *Reeder,* 22 Mich. 322, 334:

"Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the legislature is not to be presumed to have intended a conflict."

This precept is similarly enunciated in the following cases: *Stadler* v. *Helena,* 46 Mont. 128 (127 Pac. 454); *Long* v. *Culp,* 14 Kan. 412; *Stockett* v. *Bird's Admr.,* 18 Md. 484; *State ex rel. Prout* v. *Nolan,* 71 Neb. 136, (98 N. W. 657); *Bartlett* v. *Trenton,* 38 N. J. Law, 64; *Sanford* v. *King,* 19 S. D. 334 (103 N. W. 28); *State* v. *Moore,* 108 Md. 636 (71 Atl. 461); *Board of Park Commrs.* v. *Nashville,* 134 Tenn. 612 (185 S. W. 694).

2, 3. It may be conceded that the act of the sheriff in levying upon property of a stranger to the writ by virtue of an execution in his hands constitutes a breach of his official bond and results in a liability created by statute for the execution of a writ in his hands is an act in his official capacity and in virtue of his office. If it were not for the provisions of Section 7, L. O. L., the action might well be brought within six years from the wrongful taking of the property. Speaking broadly of the facts mentioned in the complaint before us, they give rise to a liability created by statute and might come within the general provision of Section 6, defining a limitation of six years; but they are more particularly mentioned in the short limitation of three years laid down in Section 7.

The substance of this statute is that in general a statutory liability may be enforced within six years, but where the accountability of a sheriff, coroner or constable is involved, the action to enforce it must be commenced within three years. As stated in Section 7, L. O. L., it is beyond dispute that if the action had been commenced against the sheriff alone it must necessarily have been instituted within three years, otherwise he escapes the consequence of his wrongdoing. No cause of action would lie on the official undertaking unless there was a default of the principal, the sheriff. That the surety occupies no worse position than the principal is taught by *State* v. *Davis*, 42 Or. 34 (71 Pac. 68, 72 Pac. 317). In the part quoted, Section 7 relates only to sheriffs, coroners and constables, who are thus put into the purview of a special statute forming an exception to the general rule enunciated in the next preceding section relating to a liability created by statute.

Howe v. *Taylor,* 6 Or. 284, was a suit against a county clerk and his sureties to recover damages for delinquencies in the conduct of his office; *Multnomah County* v. *Kelly,* 37 Or. 1 (60 Pac. 202), distinguished the position of tax collector from that of sheriff and enforced the additional tax collector's bond within six years, as distinguished from the regular, official undertaking of the sheriff; and in *State* v. *Davis,* 42 Or. 34 (71 Pac. 68, 72 Pac. 317), the principal defendant was clerk of the board of school land commissioners. Although all three of these cases cited by the plaintiff speak of the liability as one created by statute within the scope of Section 6, yet in each instance the officer whose delinquency was involved was not one mentioned in Section 7.

Sheriffs, coroners and constables form a special class of officials embraced in the shorter limitation. The particular language of Section 7 takes the present case out of the more general terms of Section 6 and constitutes the governing rule of limitation in the present instance. The Circuit Court was right in sustaining the demurrer on the ground mentioned. The judgment is affirmed. AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued on motion to stay execution June 11, denied June 18, 1918.

GEARIN *v.* FLECKENSTEIN.

(173 Pac. 569.)

Mortgages—Moratorium.

1. Laws of 1917, page 515, Section 1, granting enlisted men in the Army or Navy or National Guard of the United States a moratorium as to mortgages, does not apply to one enlisting in the Oregon State Guard, whose only duty is to guard shipyards and other places of that character within the state.

Mortgages—Stay of Execution—Counter-undertaking—"Contract."

2. Section 553, L. O. L., relating to counter-undertakings on stay of execution, applies to executions issued to enforce decrees of foreclosure; a mortgage being a "contract" within the meaning of that section.

Appeal and Error—Execution—"Stay."

3. Where appeal has been perfected, and stay bond, required by Section 553, L. O. L., has been filed, the execution theretofore issued does not become *functus officio*, and the judgment creditor is not compelled to take out a new execution upon giving the counter bond; the words "stay the proceeding" meaning to stop, to arrest, to forbear, and not contemplating any affirmative action, such as returning an execution unsatisfied.

From Multnomah: GEORGE W. STAPLETON, Judge.

Department 2.

This is a motion to stay execution on a decree against the defendants foreclosing a mortgage. The complaint was in the usual form setting forth breaches of the conditions of the instrument and default of payments when due. After demurrer, the defendant W. P. Adams answered, generally denying every allegation of the complaint and entered a plea in abatement stating that Mrs. Amelia G. Adams, his wife, had acquired title to the property after the mortgage was executed; that he had an inchoate right of curtesy therein, and that he was enlisted and in actual service in the Oregon State Guard, a voluntary organiza-

tion in the military service of the United States, and prayed for abatement until his term of enlistment should have expired, as provided in Section 1, Chapter 275, Gen. Laws 1917, which is as follows:

"No suit or action shall be commenced or maintained, during the period hereinafter provided for, to foreclose any mortgage upon real property, or to collect the debt secured thereby, if the land covered by the mortgage be owned, wholly or in part, by an enlisted man in the Army or Navy of the United States, who shall have enlisted therein in the volunteer forces or who shall have been enlisted in the National Guard of the United States and of the state of Oregon and his organization called into the service of the United States; and the lands of any such soldier or sailor shall be exempt from judicial sale for the satisfaction of any judgment during the period hereinafter provided for; provided, that this moratorium shall extend only during the period of actual service in the army or navy forces of the United States, and in no case shall begin prior to the day on which the Congress of the United States shall declare war, nor continue after sixty days subsequent to the conclusion of such war; provided, that all statutes of limitation in effect in the state of Oregon shall be suspended during the period above described, as to the mortgages, debts and judgments in this Act described."

The testimony indicated that W. P. Adams was a member of what is known as the Oregon State Guard, an organization not identical with the Oregon National Guard, but which had occasionally been called to do guard duty at the shipyards and other places of that character. The court held that this organization was not such as is contemplated by the act of 1917, *supra,* and entered a decree foreclosing the mortgage, from which decree defendants appealed, giving the usual stay bond. Plaintiff thereupon gave a counter bond as provided in Section 553, L. O. L., and execution

and order were issued directing the sale of the property. The sheriff levied and was proceeding to sell the property when defendants applied to this court for an order to recall the execution, and an order was made staying the execution and directing that sale be postponed until a hearing upon the motion could be heard in this court.

MOTION TO STAY EXECUTION DENIED.

For the motion, there was a brief over the names of *Mr. Ralph R. Duniway* and *Mr. W. P. Adams,* with an oral argument by *Mr. Duniway.*

Contra, there was a brief over the names of *Mr. Hall S. Lusk* and *Mr. Hugh C. Gearin,* with an oral argument by *Mr. Lusk.*

McBRIDE, C. J.—1. The defense, so far as it relates to Adams' military status, is a mere subterfuge and without merit. The defendant Adams is neither an enlisted man in the army of the United States nor of the State of Oregon, which has been called into the service of the United States. The organization is purely a state affair and is for service within the state and could not under any existing law be called into the service of the United States in the present war. The act of 1917 was passed to protect those in actual military service in the war from being harassed by actions or suits while absent defending their country. The defendant Adams is a lawyer 50 years of age and not subject to military service, is a member of this voluntary military organization, and has performed guard duty for a few hours for fifteen days at one of the shipyards. He practices his profession in the city and there is nothing to interfere with his defending any suit brought against him if he has any legitimate

defenses, although the record here indicates that he has none. It is true that all the allegations of the complaint were denied, but the record indicates that most of the denials are absolutely false, and such as the attorney who argued the motion in this court would never have advised a client to make.

2. The main question in the case is whether Section 553, L. O. L., relative to counter undertakings, applies to execution issued to enforce decrees of foreclosure. The section referred to is as follows:

"If the judgment or decree has been given in an action or suit upon a contract, notwithstanding an appeal and undertaking for the stay of proceedings, the respondent may proceed to enforce such judgment or decree, if within ten days from the time the appeal is perfected he filed with the clerk an undertaking, with one or more sureties, to the effect that if the judgment or decree be reversed or modified the respondent will make such restitution as the appellate court may direct. Such undertaking may be excepted to by the appellant in like manner and with like effect as the undertaking of an appellant, and the sureties therein shall have the same qualifications."

It requires no citation of authorities to show that a mortgage is a contract, and as contracts bind both parties and their privies, it is a contract which may be enforced not only against the original parties but against the defendant Adams, who purchased subsequent to the execution of the mortgage. A suit to enforce a mortgage on foreclosure according to its terms is necessarily a suit upon the contract and nothing else, and, therefore, clearly within the statute.

3. It is further insisted that when the defendants perfected their appeal and filed the stay bond requested by Section 553, the execution theretofore issued became *functus officio,* and that plaintiff upon giving the

counter bond would be compelled to take out a new execution. We find nothing in the statute to support this contention. The statute provides that the effect of the order shall be to "stay the proceeding." The words "to stay" apply to future action and mean "to stop," "to arrest," "to forbear." They do not contemplate any affirmative action such as returning an execution unsatisfied, and when the counter undertaking is given the ban of the statute is automatically removed and the proceedings temporarily stayed, resume their progress. Section 553 provides that upon giving the counter undertaking "the respondent may proceed to enforce such judgment or decree." We are of the opinion, construing the whole statute together, it was the evident intent of the lawmakers that upon the giving of the counter undertaking the proceedings should be resumed at the point where they were interrupted, and if it had been intended the plaintiff should go through the useless formality of causing the execution already issued and not satisfied, to be returned and file his counter undertaking and cause a new execution to be issued thereafter, it would have made such an intention plain by express language.

It is also said it is in the power of the court to preserve the *status quo* in any event by an order made, irrespective of the statutory stay. Conceding without deciding that we have such authority we see nothing in the present case to justify us in exercising it. The order heretofore made is vacated and the sheriff is permitted to proceed with the sale.

MOTION TO STAY EXECUTION DENIED.

JOHNS, BEAN and HARRIS, JJ., concur.

Argued June 4, remanded with directions June 18, 1918.

WATT *v.* REEVES.

(173 Pac. 463.)

Trusts—Necessary Defendant.

1. In an action to have a trust declared on a certain certificate of sale in a mortgage foreclosure on the ground of fraud of the attorney in obtaining from plaintiff's decedent an assignment of the mortgage, an assignee of the certificate is a necessary party defendant, who can be brought in under Section 41, L. O. L., providing that, when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in, although the certificate has not been recorded as required by Section 7131, providing that, if such assignments are not recorded, they shall be void as against subsequent purchasers in good faith.

From Marion: GEORGE G. BINGHAM, Judge.

Department 2.

This is an appeal from a decree rendered in a suit instituted by one Charles L. Watt, now deceased, on the 11th of April, 1917, in which suit the plaintiff prayed for a decree, declaring a trust in his favor on a certificate of sale, issued by the sheriff of Marion County, Oregon, in a suit foreclosing a mortgage previously owned by the plaintiff, and assigned by him to the defendant, Rose Heywood. Plaintiff bases his grounds for relief on the fraudulent conduct of the defendant, F. H. Reeves, who acted as attorney or agent for plaintiff Watt in the matter of the assignment of the mortgage and the note thereby secured. A decree was rendered in favor of defendants. While the suit was pending, Charles L. Watt died and plaintiff Ella Watt, as executrix of the last will and testament of Charles L. Watt, was substituted as plaintiff. Plaintiff appeals. The facts which are the basis of the suit are claimed to be as follows:

On November 17, 1912, Charles L. Watt loaned to Mattie A. Parrish $1,500, taking a mortgage on a certain four-acre tract situated on Market Street, in the City of Salem as security therefor. The mortgage was regularly recorded in Marion County. Afterwards, the City of Salem improved Market Street and entered a lien against the mortgaged premises for the sum of $1,273.71, with interest at 6 per cent, from December 6, 1913.

In June, 1916, Charles L. Watt employed F. H. Reeves, an attorney and collector, to collect or sell the Parrish note. After making some effort to collect the note, Reeves reported to Watt that he had an offer of $500 for the mortgage and the note, and advised plaintiff to sell the same. Whereupon, plaintiff assigned said mortgage in blank, the defendant Reeves thereafter filling in the name of Rose Heywood, his sister-in-law. During these negotiations, Charles L. Watt was suffering from a disease, commonly known as softening of the brain, and at times when under strain or excitement, he was easily led and deceived in matters of business, and was incapable at such times of transacting any business. He died from the effects of this disease. The price paid by defendant Reeves to Watt for the assignment of the mortgage, was $500, less a commission of $25. Watt was never informed as to who the assignee of the mortgage was. On June 21, 1916, defendant F. H. Reeves procured from Mattie A. Parrish, a new note for the sum of $1,877.50, being the principal and interest on the Watt note, and a mortgage on the same property to secure the same, taken in the name of Rose Heywood which was duly recorded. Subsequently, defendant Reeves secured from Rose Heywood, an assignment of the note and mortgage to defendant R. R. Young, a sister of the

defendant F. H. Reeves, which assignment was regularly recorded. In October, 1916, defendant F. H. Reeves, as attorney, instituted a suit in the Circuit Court of Marion County, Oregon, in the name of R. R. Young as plaintiff, against Mattie A. Parrish, for a foreclosure of the $1,877.50 mortgage. November 4th of that year, a decree was entered, foreclosing the mortgage and on December 23d of the same year, the mortgaged premises were sold at sheriff's sale. The defendant F. H. Reeves at such sale purchased the property in the name of R. R. Young to whom a certificate of sale was issued by the sheriff. On April 17, 1917, after the commencement of the suit, an assignment of the certificate of sale issued to R. R. Young, assigning her interest therein to one George H. Renner, was recorded in Marion County.

It is alleged by the defendants that George H. Renner sold the note and mortgage to one Dan Reinohl, a resident of Canada, on or about the fourth day of April, 1917. Defendant Rose Heywood was married during the pendency of the suit, and thereafter she was proceeded against under the name of Rose Mineff.

The defendant F. H. Reeves, through the entire transaction, acted as attorney for both parties, if not in his individual interest, using the names of the several parties as a matter of convenience. It appears that prior to the commencement of the suit, the attorney for plaintiff tendered to Mr. Reeves, individually and as attorney for interested parties, payment of the $500, the amount paid plaintiff for the note and mortgage. At which time defendant Reeves informed the attorney for plaintiff that the certificate of purchase was owned by Dan Reinohl. Eva Reinohl, a relative of Dan Reinohl, testified that at his request she took possession of the land in question in October,

1916, and has been in possession thereof since that time. REMANDED WITH DIRECTIONS.

For appellant there was a brief over the names of *Mr. William H. Trindle, Mr. Walter C. Winslow* and *Mr. Ivan G. Martin,* with oral arguments by *Mr. Trindle* and *Mr. Winslow.*

For respondents there was a brief over the names of *Mr. Grant Corby, Mr. Samuel T. Richardson* and *Mr. F. H. Reeves,* with oral arguments by *Mr. Corby* and *Mr. Richardson.*

BEAN, J.—1. The assignment of the sheriff's certificate of sale to Dan Reinohl was not recorded, and he was not made a party to this suit. It appears from the record that a redemption has been made from the sheriff's sale, and the money therefor, is now in the hands of the county clerk. In order to adjudicate the rights of the plaintiff to the mortgage in question or the proceeds of the sale thereunder, as against the interest claimed by Dan Reinohl, it will be necessary to make him a party to the suit, and he should be brought in: Section 41, L. O. L.; *Hough* v. *Porter,* 51 Or. 318, 367 (95 Pac. 732, 98 Pac. 1083, 102 Pac. 728); *Hawkenson* v. *Rostad,* 86 Or. 704 (169 Pac. 350).

Section 7131, L. O. L., provides for the recording of assignments of sheriff's certificate of sale of real property on mortgage foreclosure, and that if such assignment is not recorded as provided the same shall be void as against any subsequent purchaser in good faith, and for a valuable consideration of such certificate of sale, or the real property covered thereby, whose assignment shall be first duly recorded.

Plaintiff in this case is not claiming as a subsequent purchaser. In order that the rights of the parties

may be fully determined in this suit, the cause will be remanded to the Circuit Court with directions to plaintiff to make Dan Reinohl a party to the suit, and for such proceedings as may be necessary to determine his right and interest in the mortgage and note, or the moneys received upon the sale thereunder, now in the hands of the county clerk. The costs herein to await the final determination of the suit.

REMANDED WITH DIRECTIONS.

McBRIDE, C. J., MOORE and JOHNS, JJ., concur.

Argued June 4, affirmed June 18, 1918.

SCHOOL DIST. No. 4 *v.* HARTONG.

(173 Pac. 570.)

Reformation of Instruments—Mutual Mistake—Burden of Proof.

1. In suit to reform a contract on the ground of mutual mistake, the burden is on the plaintiff to clearly show the mistake and that it was mutual.

[As to reformation of instruments on the ground of mistake, see notes in 30 **Am. St. Rep.** 621; 117 **Am. St. Rep.** 227.]

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 2.

January 15, 1914, plaintiff entered into a written contract with Fred Glenn & Company whereby the company agreed to supply the plaintiff with such papers and proceedings as might be necessary to legally authorize the issuance of $100,000 of its bonds to be used in the construction of a school building for which the plaintiff, upon demand, agreed to pay the company one half of one per cent of the par value of the bonds issued under such an agreement. It is al-

leged that by mutual mistake and oversight of the parties and without the fault of either that the words

"such attorneys to be selected by us and at any stage of said proceedings when requested by us you are to furnish us the opinion of such attorneys as to the regularity and validity of the proceedings so far as the same have progressed so that such bonds can be sold upon such opinion and not subject to approval"

were omitted from and should have been incorporated in the written contract. It is conceded that the necessary records and the proceedings were furnished for the issuance of the bonds and that based thereon the bonds were issued and sold by the plaintiff. It is alleged that before the sale the plaintiff made a request of the company for the written opinion of certain specified attorneys as to the regularity and validity of the proceedings for the issuance of the bonds and that such request was ignored and the opinion was never furnished and that by reason thereof there was a breach of contract, resulting in the delay of the sale of the bonds.

January, 1916, J. M. Hartong commenced an action against the plaintiff, alleging that, as an assignee of Glenn & Company, there was due and owing him from the plaintiff $550 under the terms of the written contract.

To defeat the action plaintiff filed a cross-bill alleging mutual mistake in the execution of the written contract and sought to have it reformed by inserting therein such alleged omitted words and pending the suit to have the action at law enjoined.

To the cross-bill the defendants filed an answer in which among other denials they specifically denied that there was any mutual mistake in the execution of the written contract and affirmatively alleged that

Glenn & Company in all things and respects had complied with the terms and conditions of the contract.

The lower court made findings of fact in favor of the defendants on all of the issues presented and rendered a decree dismissing the suit from which this appeal is taken.

The only question presented by the record is whether there was a mistake in the execution of the written contract, and if so, was it mutual.

Affirmed.

For appellant there was a brief over the name of *Messrs. Smith & Bryson,* with an oral argument by *Mr. E. R. Bryson.*

For respondents there was a brief over the names of *Mr. R. A. Imlay* and *Mr. Frank S. Grant,* with an oral argument by *Mr. Grant.*

JOHNS, J.—1. The law is fundamental and is so decided by this court in the case of *Stephens* v. *Murton,* 6 Or. 193 that:

"In order to warrant a court of equity in reforming an instrument on the ground of mutual mistake, the proof of the mistake and that it was mutual must be very clear."

This principle has been followed by numerous decisions of this court, including the case of *Hughey* v. *Smith,* 65 Or. 323 (133 Pac. 68), in which they are all collated and approved. Before the written contract can be reformed it must be made to appear that there was a mistake and that the mistake was mutual and the burden is upon the plaintiff to prove that fact by clear and satisfactory evidence. After hearing the testimony the lower court found that nothing was omitted from the contract by mutual mistake or in-

advertence and that the writing constituted the only contract between the school district and Glenn & Company.

We have carefully read the complete record in this case. The written contract, as finally approved, was prepared by one of the directors of the plaintiff and was read over and discussed in a meeting of the school board and was then signed by the respective members of the board and, as so signed, the same writing was thereafter submitted to and was executed by Glenn & Company.

While it may be true that there was a mistake, as to the contract on the part of the school board, the evidence tends to show that the mistake was more in the construction of the contract by the members of the school board than in any omission from the contract.

Assuming that there was a mistake and an omission from the written contract, on the part of the school board, the evidence is neither clear nor convincing that the mistake was mutual and the judgment should be affirmed. AFFIRMED.

McBRIDE, C. J., BEAN and MOORE, JJ., concur.

Argued April 25, reversed and remanded June 18, 1918.

CAMENZIND *v.* FREELAND FURNITURE CO.

(174 Pac. 139.)

Master and Servant—Injuries to Servant—Failure to Guard Machinery—Burden of Proof.

1. In view of Laws of 1911, page 16, requiring employers to guard machinery, a servant injured by an unguarded machine has the burden of proving that it would have been practicable to have guarded it.

Master and Servant—Injuries to Servant—Safe Place to Work.

2. In the absence of a statute, the master is only required to employ reasonable care in providing a safe place to work, and, if by due care and reasonable expense the employer can lessen the risk to the employee, it is his duty to do so.

Master and Servant—Injuries to Servant—Failure to Guard Machinery—Burden of Proof.

3. In determining whether the master has, as required by Laws of 1911, page 16, used every device and precaution which it is practicable to use for the safety of the servant, customary usage in the trade is not necessarily a conclusive test of the performance of the duty.

Master and Servant—Injuries to Servant—Failure to Guard Machinery—Burden of Proof.

4. Under such statute, the fact that others do not guard their machines does not of itself excuse any other employer from protecting his machine; nor does the fact that there are no guards on the market of itself relieve any employer from guarding against a danger.

Master and Servant—Injuries to Servant—Failure to Guard Machinery—Evidence—Admissibility.

5. In servant's actions for injuries due to absence of guard from machine, evidence that a certain guard is used in Switzerland is admissible to show that it was practicable and reasonably possible to guard the machinery, but not to show that the particular guard used in Switzerland should be used.

Master and Servant — Injuries to Servant — Guarding Machinery — Duties of Master.

6. If there are no guards on the market and none known to the employer, or if the guards on the market and those known to him are not reasonably suitable, he is nevertheless required to exercise the care, capacity and intelligence of a reasonably prudent and ordinarily intelligent person to suggest and fashion a reasonably suitable guard.

Master and Servant — Injuries to Servant — Guarding Machinery — Duties of Master.

7. The employer must guard a dangerous machine when it is practicable to do so, and he performs that duty when he uses such a guard as reasonably accomplishes the purpose.

[As to duty and liability of master with respect to guarding shafting, see note in **Am. St. Rep.** 1914A, 658. As to duty of employer to guard saws, see note in **Ann. Cas.** 1913C, 125.]

Negligence — Workmen's Compensation Acts — Employers' Liability Acts—Construction.

8. Workmen's Compensation Act (Laws 1913, p. 194), Section 15, providing that it shall be no defense for the employer to show that injury was caused in whole or in part by the negligence of a fellow-servant, or that the negligence of the injured workman, other than his willful act, contributed to the accident, cuts off the defense of contributory negligence, but does not preclude the employer from

pleading contributory negligence in reduction of recoverable damages as permitted by the Employers' Liability Act (Laws 1911, p. 16).

Master and Servant—Employers' Liability Act—Character.

9. The Employers' Liability Act is remedial in abolishing fellow-servant, contributory negligence and assumption of risk defenses, and preventive in requiring the master to take active steps to lessen the possibility of injury.

Master and Servant—Employers' Liability Act—Duties of Master.

10. The duties imposed on the master by the Employers' Liability Act are nondelegable, absolute and continuing.

Master and Servant—Employers' Liability Act—Negligence Per Se.

11. Transgression of the Employers' Liability Act by the employer is negligence *per se* and is actionable.

Master and Servant—Employers' Liability Act—"Use."

12. Laws of 1911, page 16, requiring the employer to use every safety device which is practicable, is satisfied only when the employer not only provides a guard but sees to it that it is used, since the word "use" means to make use of, to employ.

Master and Servant—Employers' Liability Act—Use of Guards.

13. Under Laws of 1911, page 16, requiring the master to use every practicable safety device, since the master's duty is continuous and nondelegable he must maintain the guards upon the machine unless the machine requires readjustment with each succeeding change of work.

Master and Servant — Employers' Liability Act — Use of Guards — Duties of Master.

14. Even where the work requires constant readjustment of a machine, it is the master's duty under Laws of 1911, page 16, to see that the guard is constantly kept on the machine when practicable, since if the employee fails to attach it he merely fails to do an act which it is not his duty, but the master's, to perform.

Damages—Elements—Embarrassment.

15. An injured servant cannot recover as an element of damages for any embarrassment that may result from his changed appearance due to the accident, such element of damages being too remote and indefinite.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1.

The plaintiff Frank Camenzind suffered the loss of two fingers while working for the Freeland Furniture Company, a corporation, on a machine known as a double spindle shaper. Camenzind sued the company

and obtained a judgment for damages; and the defendant appealed.

A double spindle shaper is used in shaping table legs and other parts for furniture. The machine rests upon the floor and is about three and one-half feet in height. The top consists of a table through which there are two holes to and through each of which a perpendicular shaft extends from underneath the table. A spindle is attached to the end of each shaft. Knives are set in each spindle and are kept in position by being placed between two disks which are drawn tightly together by means of a nut. The cutting edge of each knife extends beyond the rim of the disks. The knives in the shaper are operated on the same principle as an ordinary planing-machine with this difference: the spindle on a shaper revolves on a vertical axis while the spindle on a planer turns on a horizontal axis.

The spindles are, of course, above the surface of the table and are about two feet apart. When the machine is being operated the spindles make between four and five thousand revolutions per minute. The operator must apply the wood, upon which he is working, to the rapidly revolving knives so that they will cut with and not against the grain in the wood, and in order to enable him easily to do this the right-hand spindle revolves to the left while the left-hand spindle turns to the right so that he can use one or the other spindle upon the work in hand. There are different models for table legs and other parts of furniture shaped on the machine. There is a frame for nearly every different model and consequently there are practically as many frames as there are models. The spindle is so arranged that it may be raised or lowered. Different patterns or models require different

knives and for that reason each machine is supplied with a variety of knives. When the work is changed from one to another model it is usually necessary for the operator to adjust the spindle by raising or lowering it so as to accommodate it to the stick to be shaped and also to remove the knives from the spindle and to replace them with other knives suited to the new model. The operator may find it necessary to readjust the spindle and knives many times during the course of a single day, and sometimes as often as nine and ten times in an hour.

A stick of wood is first sized on the band-saw and is then taken to the shaper. The operator of the shaper places the stick of wood in the proper frame, shoves the frame containing the stick along the surface of the table until the stick comes in contact with the knives and holds the stick against the knives until all that part of the stick which overhangs the frame is pared off. The spindle has a collar just below the knives and when the overhang of the stick is pared off the frame comes in contact with this collar preventing the knives from cutting any more off the stick with the result that the stick upon which the operator has worked takes the same shape as the side of the frame holding the stick. Sometimes a stick has a snarl or curl in it with the grain of the wood running in one way on one side of the snarl and in the opposite way on the other side of the snarl. When working on a cross-grained stick the operator must commence on the snarl or rough place and in doing this there is always danger of deviating from the center of the snarl and causing the knives to cut against instead of with the grain, and if a knife happens to cut against the grain it will "grab" and "jerk" the stick and probably throw one of the hands of the operator against a spindle.

If the shaft bearings beneath the table become worn and loose the shaft and consequently the spindle will rotate on a vacillating axis and wabble and thus increase the danger of the knives grabbing the stick and hence aggravate the risk incurred by the operator.

The plaintiff worked as a band-saw and shaper-machine man for the defendant from January, 1916, until April 7, 1916, when he was injured while operating the shaper. The plaintiff had shaped 170 sticks on the day of the accident and had 30 more sticks of the same model to shape. He placed a cross-grained stick in the frame and when he commenced to work on the rough place or snarl in the stick the knives cut against the grain, "grabbed" the stick and threw plaintiff's left hand against one of the spindles, causing the loss of two fingers.

The complaint alleges that the shaft bearings of one of the spindles became worn and loose and caused the spindle to wabble and that although the plaintiff notified the defendant of the defect the latter failed to make the necessary repairs and that because of this wabbling a knife in one of the spindles,

"became caught in a piece of wood with which the plaintiff was working, in a more unusual, uncommon and greater extent that it would have if said machine had been in proper repair, which caused plaintiff's left hand to be suddenly drawn in and against the spindle"; and "said injury was also occasioned by the carelessness, negligence and omissions of the defendant in failing to provide said shaper-machine with * * a shaper-guard, which would render it impossible for such injury as plaintiff received to occur."

The defendant answered by denying that the machine was in a defective condition or that the company had failed to provide a shaper-guard; and for affirmative defenses the defendant alleged: (1) that the in-

jury was caused by the sole negligence of the defendant; and (2) that the plaintiff assumed the risk. The defense of sole negligence is predicated upon the theory that

"the plaintiff negligently placed his hands in an improper and dangerous position while sawing the said piece of wood in that he grasped the said wood with his hands on the side of the said piece closest to the knives of the said machine" instead of holding "said wood with his hands on the side thereof closest to himself and away from said knives."

The attempted defense of assumption of risk is introduced by an allegation that the machine was in proper order and also provided with all such devices and guards as were practicable to use in the operation of the shaping machine; and then follows an allegation that

"the ordinary risks of operating the said machine *in the said condition* were open and obvious, known to the said plaintiff and appreciated by him,"

and that the plaintiff assumed whatever risk was incurred in the operation of the machine.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Bert W. Henry* and *Messrs. Griffith, Leiter & Allen,* with an oral argument by *Mr. Harrison Allen.*

For respondent there was a brief over the names of *Mr. G. E. Hamaker* and *Mr. Albert Streiff.*

HARRIS, J.—The complaint was framed and the cause was tried by the plaintiff on the theory that the defendant had failed to guard the machine as required by Chapter 3, Laws of 1911, which is commonly known as the Employers' Liability Act and was enacted in 1910

by the people in the exercise of the initiative. Section 1 of the act reads as follows:

"All owners, contractors, subcontractors, corporations or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct, or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever, shall be carefully selected and inspected and tested so as to detect any defects, and all scaffolding, staging, false work or other temporary structure shall be constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded; and all scaffolding, staging or other structure more than twenty feet from the ground or floor shall be secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom, and all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, and all shafts, wells, floor openings and similar places of danger shall be inclosed, and all machinery other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power, and in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor or subcontractor transmitting or using said electricity are liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports

bearing live wires shall be especially designated by a color or other designation which is instantly apparent and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger or shock; and generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or to the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

By the remaining sections the foreman or other person in charge of the work is made the agent of the employer and a penalty is prescribed for a failure to comply with the requirements of the act. The statute abolishes the defense of negligence of a fellow-servant and precludes the employer from pleading contributory negligence as a bar, although he may plead it for the purpose of enabling the jury to take it into account in fixing the amount of the damages. The courts and the profession have experienced not a little difficulty in construing and applying some phases of the statute and the judicial construction placed upon those phases has been to a certain degree the result of a process of evolution. While much of Section 1 has no application to the instant case it may nevertheless help to ascertain the full extent and meaning of such parts of the section as may be applicable here and thus aid in the determination of the questions presented by this appeal if the whole of the section is set down in the form of an outline as follows:

owners,
contractors,
1 ALL subcontractors, 2 ENGAGED IN
corporations or
persons whatsoever,

3 the construction, repairing, alteration, removal or painting of any 4 building, bridge, viaduct, or other structure,

5 or in the erection or operation of any machinery,

6 or in the manufacture, transmission and use of electricity,

7 or in the manufacture or use of any dangerous appliance or substance.

8 shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever,

9 shall be carefully selected and inspected and tested

10 so as to detect any defects,

11 AND ALL

- scaffolding, staging, false work or other temporary structure (12)
  - shall be constructed to bear four times the maximum weight to be sustained by said structure, and (13)
  - such structure shall not at any time be overloaded or overcrowded; (14)
- scaffolding, staging or other structure (15)
  - more than 20 feet from the ground or floor (16)
    - shall be secured from swaying and (17)
    - provided with a strong and efficient safety rail or other contrivance, (18)
      - so as to prevent any person from falling therefrom, (19)
- dangerous machinery shall be securely (20)
  - covered and protected (21)
    - to the fullest extent that the proper operation of the machinery permits, (22)
- shafts, wells, floor openings and similar places of danger (23)
  - shall be enclosed, (24)
- machinery other than that operated by hand power shall, whenever necessary (25)
  - for the safety of persons employed in or about the same or for the safety of the general public, (26)
    - be provided with a system of communication by means of signals, (27)
      - so that at all times there may be prompt and efficient communication between the employes or other persons and the operator of the motive power, (28)

29 AND IN THE TRANSMISSION AND USE OF ELECTRICITY OF A DANGEROUS VOLTAGE

30 full and complete insulation shall be provided at all points where the public or the employes of the owner, contractor or subcontractor 31 transmitting or using said electricity 32 are liable to come in contact with the wire, and 33

34 dead wires shall not be mingled with live wires, nor strung upon the same support, and

35 the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent and

36 live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock;

37
AND GENERALLY, ALL
38 owners, contractors or subcontractors and other persons
39 having charge of, or responsible for,
40 any work involving
41 a risk or danger
42 employes or the public,
43 shall use every
44 device, care and precaution
45 which it is practicable to use for the protection and safety of life and limb,
46 limited only by the necessity for preserving the efficiency of the
47 structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

Turning to 20 in the outline it may be observed that all "dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits." It may be assumed, without deciding, that this clause refers more especially to revolving shafts having beveled gearing or protruding nuts or exposed bolt-heads, and to cog-wheels and the like. It is manifest, however, that all that part of the section which follows the words "and generally" is applicable to the instant case. If the work involves a risk or danger to the employee the employer must use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the machine.

1. The complaint alleges that the defendant failed to use every device which it was practicable to use and that when fully equipped the machine has a safety-guard attached to it which does not in any manner interfere with the efficiency of the machine. The defendant denied this allegation and hence the pleadings raised an issue which required evidence. In some states the burden is upon the employer to show that a guard is impracticable: *Reddington* v. *Blue & Raferty,* 168 Iowa, 34 (149 N. W. 933); *Gross* v. *Eagle Wheel Mfg. Co.,* 252 Pa. 361 (97 Atl. 457); *Caspar* v. *Lewin,* 82 Kan. 604, 635 (109 Pac. 657, 49 L. R. A. (N. S.) 526); but in this jurisdiction the burden is upon the plaintiff to show that it was practicable to guard the machine: *Cameron* v. *Pacific Lime & Gypsum Co.,* 73 Or. 510, 517 (144 Pac. 446, Ann. Cas. 1916E, 769).

Previous to 1913, when he came to Oregon, the plaintiff had worked for about fifteen years on shaper-machines in Switzerland. He made and was permitted to introduce in evidence a wooden model of a guard

that he had used in Switzerland. The defendant contends that it was error to permit Camenzind to testify that guards like Exhibit "F," the wooden model, were used in Switzerland and that it was also error to receive Exhibit "F" in evidence. It was not shown that Exhibit "F" had been in general use in Oregon or that the defendant had actual knowledge of the existence of such a guard. A deputy labor commissioner and factory inspector of Oregon testified, however, that "in one instance" he had seen "a guard of that nature" prior to April, 1916. The argument of the defendant is that

"evidence of practicability of any safety device must be confined to comparisons with other devices in use under similar circumstances and in local areas"; and that "to determine whether or not the device suggested for use is practicable or feasible, it must be shown to be in common use in the vicinity where defendant's machine is being operated or to be in general use on machines of the kind under observation."

2–5. In the absence of a statute the master is only required to employ reasonable care in providing a safe place to work and if by due care and reasonable expense the employer can lessen the risk to the employee it is his duty to do so: *Duntley* v. *Inman,* 42 Or. 334, 343 (70 Pac. 529, 59 L. R. A. 785); *Westman* v. *Wind River Lumber Co.,* 50 Or. 137, 140 (91 Pac. 478). In some states the courts hold, as a matter of law, that the employer does his full duty if he uses such machinery and safety appliances as are in general use, while in other jurisdictions usage is not conclusive but is only to be considered in connection with other evidence: *Adams* v. *Corvallis & E. R. Co.,* 78 Or. 117, 128 (152 Pac. 504); 3 Labatt on Master and Servant (2 ed.), §§ 940 and 947. Whether usage is accepted

as a conclusive test or received merely as evidence of due care it is accepted as a test on the one hand and is received as evidence on the other hand on the theory that employers generally exercise reasonable care and that therefore whatever appliances employers may generally use are such as a reasonably prudent person would use. The statute, however, has enlarged the duty of the master and instead of being satisfied with the exercise of reasonable care the law now requires the master to use every device, care and precaution which it is practicable to use for the safety of the servant: *Nordin* v. *Lovegren Lumber Co.,* 80 Or. 140, 147 (156 Pac. 587); see also: *Caspar* v. *Lewin,* 82 Kan. 604, 635 (109 Pac. 657, 49 L. R. A. (N. S.) 526). Since the duty of the master has been enlarged it necessarily follows that usage is not necessarily a conclusive test of the performance of that duty. It may or it may not be the custom of employers to obey the statute and yet no one of them can be excused from obeying the statute even though every one of them has disobeyed its mandate: 3 Labatt on Master and Servant (2 ed.), § 944; *Reddington* v. *Blue & Raferty,* 168 Iowa, 34 (149 N. W. 933); *Callopy* v. *Atwood,* 105 Minn. 80 (117 N. W. 238, 18 L. R. A. (N. S.) 593); 5 Labatt on Master and Servant (2 ed.), 5663. The contention of the defendant, if adopted, would in effect nullify the Employers' Liability Act. The argument of the defendant even goes to the extent of making usage the sole test of practicability. The application of this sort of a test would relieve an employer from guarding a machine if no other employer guarded the same kind of a machine under like conditions. The fact that others do not guard their machines does not of itself excuse any other employer from protecting his machine; nor does the fact that there are no guards on

the market of itself relieve any employer from guarding against a danger. There are two principal questions to be answered: Does the machine involve risk or danger? and, Is it practicable to guard the danger and at the same time preserve the efficiency of the machine? It is conceded that the shaper involves a risk or danger and therefore comes within the embrace of the statute; but since the answer denies that it is practicable to guard the machine it was competent for the plaintiff to offer evidence concerning Exhibit "F." Evidence relating to the guard used in Switzerland was competent, not for the purpose of showing that the defendant should have used that particular guard, but to show that it was practicable and reasonably possible to guard the spindle: *Cameron* v. *Pacific Lime & Gypsum Co.*, 73 Or. 510, 518 (144 Pac. 446, Ann. Cas. 1916E, 769).

6, 7. The defendant insists that to admit evidence of Exhibit "F" is equivalent to saying that an Oregon employer is liable for failure to have a guard on his machine even though there be no known guard in all the world except in Switzerland where some inventive genius has contrived one which is only known to him or to the workmen employed there.

The Employers' Liability Act neither contemplates nor requires that employers shall possess a genius for invention, but, as was said in *Barclay* v. *Puget Sound Lumber Co.*, 48 Wash. 241 (93 Pac. 430, 16 L. R. A. (N. S.) 140, 145), "they must not stand back and await the suggestion of remedies, when the exercise of reasonable prudence and care on their part will suggest them." The employer must guard a dangerous machine when it is practicable to do so and he performs that duty when he uses such a guard as reasonably accomplishes the purpose: *Burroughs* v. *Cur-*

tiss Lumber Co., 58 Or. 270, 275 (114 Pac. 103); *Stephenson* v. *Sheffield Brick & Tile Co.,* 151 Iowa, 371 (130 N. W. 586); *Kirchoff* v. *Hohnsbehn Creamery Supply Co.,* 148 Iowa, 508 (123 N. W. 220); *Reddington* v. *Blue & Raferty,* 168 Iowa, 34 (149 N. W. 933); *Wagner* v. *Standard Sanitary Mfg. Co.,* 244 Pa. 310 (91 Atl. 353); *Gross* v. *Eagle Wheel Mfg. Co.,* 252 Pa. 361 (97 Atl. 457). The statute does not penalize a want of genius by imposing a penalty, nor does it reward a want of common prudence and intelligence by excusing culpability. The law does not expect all men to be geniuses, nor does it expect all men to be dullards. If there are no guards on the market and none known to the employer or if the guards on the market and those known to him are not reasonably suitable he is nevertheless required to exercise the care, capacity and intelligence of a reasonably prudent and ordinarily intelligent person to suggest and fashion a reasonably suitable guard; and in this connection it may be added that Exhibit "F" was competent evidence to submit to the jury for their consideration in determining whether the defendant was liable in damages for not having used a guard on the shaper. It is true that the defendant claims that it used a guard. The plaintiff, however, took the position that a guard was never furnished; and hence he was entitled to offer evidence for the purpose of proving the elements essential to his theory of the case.

8. The plaintiff contends that there was only one question properly to be submitted to the jury. This contention arises out of the fact that the defendant elected not to accept the benefits of the Workmen's Compensation Act and is predicated on the theory that this statute precludes an employer, who would come within its embrace unless he has formally elected not to

accept its benefits, from pleading the negligence of the employee either as a bar or for the purpose of reducing the amount of damages recoverable from the employer. In brief, the position of the plaintiff is that Camenzind is entitled to recover even though he was negligent and the Freeland Furniture Company was not negligent, unless the injury was caused by his willful act committed for the purpose of sustaining the injury. Section 15 of Chapter 112, Laws of 1913, commonly known as the Workmen's Compensation Act, provides that in any action for personal injury brought against any employer engaged in any of the occupations specified by the statute

"it shall be no defense for such employer to show that such injury was caused in whole or in part by the negligence of a fellow-servant of the injured workman, that the negligence of the injured workman, other than in his willful act, committed for the purpose of sustaining the injury, contributed to the accident, or that the injured workman had knowledge of the danger or assumed the risk which resulted in his injury."

If we again look at Section 15 and quote only such part of it as is applicable to the subject under discussion it will be seen that it will read thus:

"It shall be no defense for such employer to show * * that the negligence of the injured workman contributed to the accident * * ."

The title of the act speaks of "abolishing in certain cases the defenses of assumption of risk, contributory negligence and the negligence of a fellow servant in actions for personal injury and death." It will be noticed that the words "in whole or in part" are used in connection with "the negligence of a fellow-servant"; but neither the words "in whole or in part" nor any equivalent language is used in con-

nection with "the negligence of the injured workman." Manifestly, the Workmen's Compensation Act does no more than to abolish the *defense* of contributory negligence and no appropriate language is used to indicate an intention to preclude the employer from pleading contributory negligence in reduction of recoverable damages as permitted by the Employers' Liability Act. Most of the precedents cited by the plaintiff relate to claims for compensation made pursuant to a Workmen's Compensation Act by employees entitled to receive the benefits provided for by it, while the remaining cases relied upon by the plaintiff discuss statutes containing language unlike ours.

The court refused to instruct the jury that the company performed the duty imposed upon it by the Employers' Liability Act if it furnished guards and left them where they could have been used by the plaintiff; but the court told the jury that

"it is the duty of the master to put the safety device on the machine and to see that it is kept there at all times except when the work requires that it shall be removed."

The position taken by the defendant can be better understood if attention is first directed to some facts not already related. In January, 1916, Camenzind presented himself to the defendant's superintendent and asked for employment, stating that he was a band-saw and shaper-machine man with 15 years' experience. The superintendent testified as follows:

"I said, 'Do you understand operating and taking care of the machines, and filing your band-saws and brazing them and adjusting them?' And he said he had had fifteen years' experience in the old country, and was capable of going ahead and doing the work, and consequently I put him to work"; and "I took him

in the factory and showed him the band-saw and shaper and patterns and headers, and everything belonging to the machine; even the knives and wrenches, and everything that went with the machine."

Twenty-five or thirty frames, knives and caskets containing knives for the shaper-machine were hanging on a wall immediately in front of and six or eight feet from the machine. Witnesses for the defendant stated that two guards, like the guard offered in evidence by the defendant and marked Exhibit "X," came with the machine and that when the shaper was installed more than a year prior to the accident the two guards were either hanging on the wall where the frames and knives were kept or they were laid upon the floor and against the wall. There was evidence to the effect that the guards had been used on the machine prior to January, 1916. There is no evidence tending to show that the guards were attached to the machine when Camenzind went to work; and there is no evidence from which it can be inferred that Camenzind used the guards at any time during the period of his employment. Witnesses for the defendant declared that the guards which had come with the machine were either hanging on the wall or were upon the floor and against the wall when Camenzind was injured. Camenzind testified that there were no guards on the machine in January when he commenced to work; and that he never at any time saw the guards or knew of their existence. Moreover, the superintendent admitted that on one occasion he observed the plaintiff performing his work in what he considered was a careless way and that the plaintiff was working without a guard, and yet the superintendent does not

say that he directed or even suggested that Camenzind make use of the guards.

It is conceded that Exhibit "X" is a suitable guard and the plaintiff admitted that if it had been on the machine he would not have been injured. The plaintiff says that the defendant did not even furnish guards like Exhibit "X," while the defendant insists that it did. The company either did or it did not furnish the guards; if it did not furnish them at all then on its own theory of the law the defendant is liable. But if the company did furnish guards and they were where it claims they were then a situation is presented where the defendant contends that it did and the plaintiff insists that it did not perform its full duty. The argument of the defendant is that the very work in which the plaintiff was engaged made it necessary for the plaintiff, as a part of that work, to remove and replace the guards, for it must be remembered that whenever the work changed from one to another model it was necessary to change knives and to raise or lower the spindle so as to accommodate the machine to the changed model. There is testimony, too, that a guard cannot be used at all when the employee is working on some models. It is conceded, however, that it was practicable to have used a guard on the work in which the plaintiff was engaged when injured.

9. It must at all times be kept in mind that the Employers' Liability Act is both remedial and preventive in character. To the extent that the statute abolishes the defenses of common employment, contributory negligence and assumption of risk it is purely remedial; and to the extent that it imposes upon the master the duty of taking active steps to lessen the possibility of injury or death to the employee it involves the additional element of prevention; and it may also

be observed that as stated in *Browning* v. *Smiley-Lampert Lumber Co.*, 68 Or. 502, 512 (137 Pac. 777), our statute seems to be broader in its scope than kindred statutes found in other states. The outstanding purpose of the statute is to protect employees from injury and the statute should be liberally construed to effect that purpose: *Schaedler* v. *Columbia Contract Co.*, 67 Or. 412, 416 (135 Pac. 536); *Wasiljeff* v. *Hawley Paper Co.*, 68 Or. 487, 498 (137 Pac. 755); *McFarland* v. *Oregon Electric R. Co.*, 70 Or. 27, 33 (138 Pac. 458, Ann. Cas. 1916B, 527); *Blair* v. *Western Cedar Co.*, 75 Or. 276, 281 (146 Pac. 480); *Dickerson* v. *Eastern & Western Lumber Co.*, 79 Or. 281, 288 (155 Pac. 175); *Clayton* v. *Enterprise Electric Co.*, 82 Or. 149, 156 (161 Pac. 411); 5 Labatt on Master and Servant (2 ed.), 5660.

10, 11. The duty imposed upon the master by the Employers' Liability Act is a nondelegable duty: *Morgan* v. *Bross*, 64 Or. 63, 68 (129 Pac. 118); *Dickerson* v. *Eastern & Western Lumber Co.*, 79 Or. 281, 287 (155 Pac. 175); it is also a continuing duty: *Dickerson* v. *Eastern & Western Lumber Co.*, 79 Or. 21, 27 (155 Pac. 175); 5 Labatt on Master and Servant (2 ed.), 5665; and therefore when we once determine the duty imposed upon the master we find a duty which is absolute, nondelegable and continuing; the employer cannot absolve himself from the performance of it nor can he delegate it to the employee, but it adheres to him without the possibility of suspension or interruption. Moreover, a transgression of the statute is negligence *per se* and is actionable: *Morgan* v. *Bross*, 64 Or. 63, 70 (129 Pac. 118); *Dorn* v. *Clarke-Woodward Drug Co.*, 65 Or. 516, 519, 621 (133 Pac. 351); *Askatin* v. *McInnis & Reed Co.*, 67 Or. 320, 325 (135 Pac. 322); *Tamm* v. *Sauset*, 67 Or. 292, 297 (135 Pac. 868, L. R. A.

1917D, 988); *McClaugherty* v. *Rogue River Electric Co.*, 73 Or. 135, 142 (140 Pac. 64, 144 Pac. 569); *Dickerson* v. *Eastern & Western Lumber Co.*, 79 Or. 281, 291 (155 Pac. 175); *Cauldwell* v. *Bingham & Shelley Co.*, 84 Or. 257, 268 (155 Pac. 190, 163 Pac. 827).

Much is said by the defendant in his printed brief about relief from liability if the injury was caused by the sole negligence of the plaintiff. Camenzind cannot recover unless the company violated some duty imposed upon it. The plaintiff in his complaint specifies the duty which he claims was violated. The defendant either did or did not violate the duty to guard the machine; if the company did violate that duty the violation is negligence *per se* and is actionable and a claim for damages cannot be barred by either of the defenses of contributory negligence, negligence of a fellow-servant or assumption of risk. If, however, the defendant did not violate the duty specified in the complaint then the defendant and not the plaintiff is entitled to a judgment.

12. The Employers' Liability Act does not say that the employer shall "furnish" or "provide" but it commands that he "shall use" every device which it is practicable to "use." In the New Standard Dictionary the primary meaning of the word "use" is said to be:

"To employ for the accomplishment of a purpose; make use of; as, to use tools."

Webster defines the word thus:

"To make use of; to avail one's self of; to employ."

The Century Dictionary says that the term primarily means

"To employ for the attainment of some purpose or end; avail one's self of."

If a guard is actually employed on a machine we can with propriety say that it is being used, is in use, is used; but if the guard is detached from the machine and left upon the floor where it can be had whenever wanted the most that can be said is that it is available for use and therefore can be used, although not used. In *People* v. *Sommer,* 106 N. Y. Supp. 190, 191 (55 Misc. Rep. 55), it was held that the mere possession by one whose business it was to fill siphons with aerated water for dealers, of a box of siphons found near the filling-machine, but not shown to have been filled by him, was not a "use" of such siphons, within a statute providing that the "use" of a bottle, or siphon by any person, other than the one whose name or mark shall be thereon, without the latter's consent, shall be presumptive evidence of unlawful "use."

13. If the shaper were a machine which did not require readjustment with each succeeding change of work and if it were practicable to attach a guard to the machine and keep it there without removal or readjustment, then it is fair to assume that all parties would concede that it would be the duty of the employer to see that a guard is actually attached to the machine and maintained there. All the decided cases, dealing with statutes akin to ours, which a diligent search has been able to discover, are agreed that it is not enough merely to furnish guards but the employer must attach them; and since his duty is continuous and nondelegable he must maintain them: *Dickerson* v. *Eastern & Western Lumber Co.,* 79 Or. 281, 288 (155 Pac. 175); *Johnson* v. *Far West Lumber Co.,* 47 Wash. 492 (92 Pac. 274); *Baltimore & O. S. W. R. Co.* v. *Cavanaugh,* 35 Ind. App. 32 (71 N. E. 239); *Davidson* v. *Flour City Ornamental Iron Works,* 107 Minn. 17 (119 N. W. 483, 131 Am. St. Rep. 433,

28 L. R. A. (N. S.) 332); *Paul Mfg. Co.* v. *Racine,* 43 Ind. App. 695 (88 N. E. 529); *Benner* v. *Wallace Lumber & Mfg. Co.,* 55 Wash. 679 (105 Pac. 145, 45 L. R. A. (N. S.) 128); *Groves* v. *Wimborne* (1898), 2 Q. B. 402 (67 L. J. Q. B. (N. S.) 862, 79 L. T. (N. S.), 284, 47 Week. Rep. 87); 5 Labatt on Master and Servant (2 ed.), 5665.

14. If, in order completely to perform the duty imposed upon him by the statute, the employer must attach and maintain a guard on a machine when it can be kept there constantly without the necessity of removal or readjustment then by the same token, he must in order completely to perform his duty, as to any given piece of work with which it is practicable to use a guard, attach the guard to the machine and see that it is kept there while the servant is engaged with such piece of work. The statute, of course, does not require a guard to be used unless it is practicable to do so. If it be supposed that the employer actually employs a guard when the employee shapes table leg No. 1 but since it is not practicable to employ the guard on table leg No. 2 the employer removes the guard so the employee can shape table leg No. 2: Can it be said that the guard is used when table leg No. 2 is being shaped? Suppose, further, that the employee had been injured while working on table leg No. 2 and had sued the employer for failure to guard the machine: Could the employer say that he had used a guard? Assuredly his answer would be, not that he had used a guard, but that he had not used a guard because it was not practicable to have done so. Again, suppose that the guard had never been attached to the machine but had been placed upon the floor or hung upon the wall and left there while the employee shaped both table legs: Would it be logical and ra-

tional to say that the guard was used on table leg No. 1, for the reason that it could have been used, and that it was not used on table leg No. 2 for the reason that it could not have been used. A guard on the floor is not a guard on the machine. The statute is satisfied with guards on the machine but not with guards on the floor.

It is the duty of the employer to attach and maintain a guard when it is practicable to use a guard; and that duty is absolute, nondelegable and continuing. If an employee, who operates a machine, attaches the guard to the machine he has merely performed the employer's duty; but if the employee fails to attach a guard, though furnished and available, he has merely not done what is not his duty to do but is the duty of the employer to do. The case of *Baltimore & O. S. W. R. Co.* v. *Cavanaugh,* 35 Ind. App. 32 (71 N. E. 239), in all its essential features is the counterpart of the instant case and the conclusion reached there conforms with the conclusion arrived at here. However, it is proper to explain that the force of what is said by the court in *Baltimore & O. S. W. R. Co.* v. *Cavanaugh, supra,* is much impaired by the subsequent opinions in *Pinnell* v. *Cutsinger,* 44 Ind. App. 419 (89 N. E. 493), and in *Cleveland etc. R. Co.* v. *Oesterling,* 182 Ind. 481 (103 N. E. 401). To hold that it can be made the duty of an employee to attach and maintain a guard is to hold that the duty to attach and maintain can be delegated to and imposed upon the employer. It has been argued that this construction of the statute imposes a heavy burden upon the employer. While we do not say that the statute does or does not impose a heavy burden, we do say that if it does rest heavily on the employer the answer to that argument is: We are dealing with the statute as it is

and not as it might have been. It is not for the courts to say whether the statute is or is not wise legislation. Finding a valid statute it is the duty of the courts to enforce it. The trial court properly refused to charge the jury that the defendant performed its duty if it merely furnished guards by placing them within reach of the employee.

15. Among other instructions the Court charged the jury as follows:

"If you shall find in favor of the plaintiff you may allow him such sum as will compensate him for any pain and injury he may have suffered and for any pain and injury growing out of the accident that he may suffer in the future, if you shall find he will suffer any. Also take into consideration any mutilation of his body, any embarrassment that may result from his changed appearance."

It was prejudicial error for the court to instruct the jury that in estimating the damages they could consider "any embarrassment that may result from his changed appearance." There is a conflict of authority as to whether a recovery may be had for mortification and humiliation arising from the contemplation of the disfigurement of the person; but this court has committed itself to the doctrine that humiliation and embarrassment, wholly sentimental, arising from the contemplation of a disfigurement of the person is too remote and indefinite to constitute a possible element of damage: *Maynard* v. *Oregon R. Co.*, 46 Or. 15, 18 (78 Pac. 983, 68 L. R. A. 477); *Boatright* v. *Portland Light & Power Co.*, 68 Or. 26 (135 Pac. 771); 8 R. C. L. 524.

There may be situations where in the very nature of things the employer does his full duty when he merely furnishes safety devices, as possibly in cases like *Heiser* v. *Shasta Water Co.*, 71 Or. 566 (143 Pac.

917), where the devices, consisting of gloves and a mask are not attached to the machine but are designed to be worn by the employee. Another class of cases where the employer need do no more than furnish and provide safety devices may possibly be found where the work done by the employee necessarily requires the exercise of judgment and discretion in the selection of tools and instrumentalities and the manner and mode of performing the work.

In the instant case, the defendant placed the plaintiff at a machine involving a risk and danger. Some and probably most of the work could be done with a guard while some work could not be done with a guard. The defendant could not absolve itself from liability by delegating its duty to the plaintiff. Although the defendant could not strip itself of its duty by transferring that duty to the plaintiff so as to make the latter carry all the risk and while the defendant cannot defeat this action by pleading assumption of risk or contributory negligence, yet the defendant is entitled to plead, for the purpose of reducing recoverable damages, that the plaintiff was guilty of contributory negligence if guards were furnished and known to the plaintiff and he failed to use them.

The judgment is reversed and the cause is remanded for a new trial. REVERSED AND REMANDED.

McBRIDE, C. J., BENSON and BURNETT, JJ., concur.

Argued April 25, reversed and remanded May 28, rehearing denied June 25, 1918.

FREDERICK v. SHERMAN.

(173 Pac. 575.)

Fraud—Action—Evidence.

1. In an action to recover money paid to defendants for the exclusive right to sell patented automobile tires in the state on the ground that defendants had nothing to sell because the contract between the manufacturing company under whom defendants claimed and the owner of the patent right had been canceled, evidence *held* to show that such contract had not been canceled when plaintiff's contract with defendants was made.

Fraud—Fraudulent Concealment of Facts—Cause of Action.

2. In such case the fact that defendants knew that the manufacturing company would not be able to supply tires to plaintiff and fraudulently concealed such information from the plaintiffs, who had no knowledge thereof, did not constitute a cause of action to rescind the contract and to recover damages, in the absence of any fiduciary relation between the parties or any special state of facts wherein silence becomes in effect an active misrepresentation.

[As to effect of fraudulent concealment by vendor, see note in 15 Am. Dec. 106.]

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1.

This is an action to recover money. The complaint recites that on August 14, 1915, defendants induced plaintiffs to purchase from them the exclusive right to sell certain patented automobile tires in the State of Oregon, by falsely representing that the Davis-Fry Manufacturing Company was the owner of and had the exclusive right of manufacture and sale of such tires in all the territory of the United States. That defendants, through said company, had the exclusive right to sell such tires in the State of Oregon, except as to certain specified counties, and that for the sum of $1,000, defendants would assign to plaintiffs the rights and privileges granted to them by such manufacturing com-

pany; that relying upon such represenations, they contracted with defendants therefor, and paid them the $1,000; that these representations were false, in that the Davis-Fry Manufacturing Company was not the owner and did not have any right to manufacture or sell the tires, for the reason that the contract between the company and the owner of the patent right, had been canceled on May 11, 1915, which fact was then known to defendants, but was unknown to plaintiffs. These allegations are followed by the following paragraphs:

"That defendants at all times while soliciting and inducing plaintiffs to contract with and pay defendants said sum of $1,000 as hereinbefore alleged and set forth, well knew that said Davis-Fry Manufacturing Company was financially unable to manufacture 'Hercules Tires' sufficient to supply a reasonable demand in the territory in which defendants were trying to induce plaintiffs to purchase the exclusive right of sale of said 'Hercules Tire,' even if allowed to continue such manufacture by the Hurley Hercules Pneumatic Tire Company, and defendants further well knew that said Davis-Fry Manufacturing Company was and would be at all future times wholly unable to comply with the conditions of its contract with said Hurley-Hercules Pneumatic Tire Company, which contract defendant F. H. Sherman had executed as President and on behalf of said Hurley-Hercules Pneumatic Tire Company, and which contract required said Davis-Fry Manufacturing Company to manufacture a sufficient number of 'Hercules Tires' to supply the demand therefor in the 'territory under the government of said United States of America,' and which contract further provided that a failure to do this would give the said Tire Company the right to cancel said contract; that defendants further knew that said provisions in said contract between said Hurley Hercules Pneumatic Tire Company and said Davis-Fry Manufacturing Company were wholly unknown to plaintiffs or either of them, and said defendants con-

cealed said provisions of said contract from plaintiffs for the purpose of inducing plaintiffs to pay them said sum of $1,000 for the alleged right to sell said 'Hercules Tire' in the State of Oregon, which concealment was fraudulent on the part of defendants.

"That the said Davis-Fry Manufacturing Company had never at any time complied with the terms of its contract with said Hurley Hercules Pneumatic Tire Company after the same was entered into, which fact was well known to defendants but was wholly unknown to plaintiffs or either of them, which fact was fraudulently concealed from the plaintiffs by defendants for the purpose of inducing plaintiffs to pay defendants said sum of $1,000; that said Davis-Fry Manufacturing Company has become wholly insolvent and bankrupt and has ceased to transact business of any kind, and its affairs are now being administered upon by the bankruptcy courts of the United States of America for the District of California."

Issues having been joined, there was a trial to a jury, resulting in a verdict and judgment for plaintiffs, and defendants appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

For appellants there was a brief and an oral argument by *Mr. John H. Hall.*

For respondents there was a brief and an oral argument by *Mr. Plowden Stott.*

BENSON, J.—There are a number of assignments of error, but the conclusions reached by us render it unnecessary to consider any of them except the action of the trial court in denying defendants' motion for a judgment of nonsuit, made at the conclusion of the hearing of plaintiffs' testimony and after plaintiffs had rested. Plaintiffs' right to rescind the contract and recover the purchase money paid by them, is based, by

the complaint, upon two grounds: (1) that defendants had nothing to sell, because, at the time of the transaction, the contract between the manufacturing company and the owner of the patent right had been canceled: (2) that defendants had knowledge of the fact that the manufacturing company was then in such a shaky financial condition that they would not be able to supply tires in sufficient quantities, and that they fraudulently concealed this information from plaintiffs who were ignorant of the facts.

1. Upon the first of these grounds it may be said that a careful inspection of the evidence discloses a complete failure of proof. The evidence upon this subject is to the effect that in May of the same year, the president of the corporation owning the patent right, served a written notice of cancellation upon the manufacturing company, which declined to concede the right of the former to annul the contract in that manner, and demanded an arbitration of the issue, as provided in the contract itself, and thereafter, following the terms of the contract, both parties appointed arbitrators, but nothing further was done in the matter, and the manufacturing company continued to make and sell tires and pay the required royalty to the owner of the patent, until December, in which month the manufacturing company went into bankruptcy, and from the date of their purchase, in August, until December, plaintiffs received tires from them and sold them to customers. The evidence therefore discloses affirmatively that the contract had not been canceled when plaintiffs entered into their contract with defendants.

2. We are then called upon to say whether the allegations of the complaint in regard to fraudulent concealment of facts, states a case of actionable fraud. Story

on Contracts (5 ed.), Section 517, in discussing this subject says:

"The law never undertakes to refine upon nice ethical distinctions; and although it lends no countenance to injustice, and will not support immorality, yet it often stops short of enforcing a merely honorary obligation. Questions of law must be determined upon general principles, which, although they may reach the aggregate of cases, may often fail to extract the sting of injustice and immorality from the individual case. Thus, it is the general policy of the law, in order to induce vigilance and caution, and thereby to prevent those opportunities of deceit which lead to litigation, to throw upon every man the responsibilities of his own contracts, and to burden him with the consequences of his careless mistakes."

Fry on Specific Performance (5 ed.), page 353, quotes the foregoing expression of Story with approval, and says:

"But it has never, it is believed, been held by our Courts, that there is any general obligation to disclosure on the part of a vendor or purchaser of chattels or realty, though the person maintaining silence may know that the other party is acting under an erroneous impression."

Bigelow on Fraud, page 590, has this to say:

"Now silence alone, it may be declared as a general rule, is not unlawful in transactions between men at arm's-length, however great the advantage gained thereby; a man's unpublished thought is surely his own. But it must be understood at the outset, that by silence we mean entire silence as distinguished from that sort which merely keeps back part of the truth told or suggested. This latter is nothing else than misrepresentation, and has already been referred to. But speaking of pure silence, the general rule stated is very strong. It governs, even though the silence was meditated, and with knowledge that the opposite party was laboring

under mistake or ignorance. Thus, neither the seller nor the buyer of goods is bound to communicate intelligence of external circumstances, exclusively within his own knowledge, which might influence the market value of the commodity."

It is needless to multiply citations. This general rule is applicable except in certain excepted cases, wherein there is a fiduciary relation existing between the parties, or some special state of facts wherein silence becomes in effect an active misrepresentation. It would take too much space to enumerate these, for here the parties dealt at arm's-length, and none of those exceptional facts are recited. We conclude therefore that the alleged concealment of facts does not constitute actionable fraud, and the trial court erred in denying a judgment of nonsuit. The judgment is reversed and the cause will be remanded with directions to enter a judgment of nonsuit.

REVERSED AND REMANDED WITH DIRECTIONS.

REHEARING DENIED.

McBRIDE, C. J., BURNETT and HARRIS, JJ., concur.

Argued at Pendleton May 6, affirmed June 4, rehearing denied June 25, 1918.

WAGONER *v.* CITY OF LA GRANDE.*

(173 Pac. 305.)

Statutes—Sufficiency of Title—Amendment of City Charter.

1. The title, "An act to amend the charter of the city of La Grande in Union County, State of Oregon," was sufficient.

*On validity of contract for material patented or held in monopoly where a letting to the lowest bidder is required, see notes in 18 L. R. A. 45; 5 L. R. A. (N. S.) 680; 46 L. R. A. (N. S.) 990.

On the right of taxpayer, in absence of statute, to enjoin unlawful expenditures by municipality, see note in 36 L. R. A. (N. S.) 9.

REPORTER.

Municipal Corporations—Amendment of Charter—Ballot Title—Sufficiency.

2. The ballot title of an act amending the charter of a city, "Shall the proposed amendment of the charter of the City of La Grande, Oregon, including the amendment of said charter providing for reassessment of street improvements already made, be adopted," was sufficient as expressly directing attention to the amendment of the charter authorizing reassessments.

[As to necessity that propositions submitted to the voters of a municipality be stated singly, see note in Ann. Cas. 1912D, 319.]

Municipal Corporations — Street Improvements — Remonstrances — Amendment of Charter.

3. The language on the subject of remonstrances by property owners in the provisions of the charter of 1915 of the City of La Grande, as to reassessments for street improvements, is referable only to the provision of the same charter that if the owners of 55 per cent of the property affected, measured by the front foot, object, the commission shall be ousted of jurisdiction for six months, and have no application to remonstrances filed before amendment of the charter in 1913, when it contained no provision whereby remonstrance was effectual to defeat an improvement.

Municipal Corporations—Street Improvements—Reassessment—Fraud.

4. The only fraud which will defeat a reassessment for a street improvement is fraud of the city council in the reassessment proceeding.

Municipal Corporations — Street Improvement — Reassessment—Lack of Jurisdiction.

5. The council's lack of jurisdiction in the original proceeding for a street improvement will not defeat a reassessment therefor.

Municipal Corporations — Street Improvement — Void Contract—Reassessment.

6. The fact that street improvement work was done under a void contract will not preclude a reassessment of the property, where the statute authorizes it.

Municipal Corporations — Street Improvement — Price—Discretion of Council.

7. If the price for a street improvement was not so grossly excessive as to imply fraud, the matter of price was within the discretion of the city counsel.

Municipal Corporations—Street Improvement—Review of City Council—Supreme Court.

8. In suit to enjoin the enforcement of municipal liens imposed to pay for a street improvement, the Supreme Court has not jurisdiction to review the legislative acts of the city council in determining the question of benefits, and whether the improvement is out of proportion to the value of the objectors' property.

Constitutional Law — Legislative Acts — Determination of Council Fixing Improvement District—Review.

9. The determination of the city council, fixing the district to which the expense of a street improvement should be chargeable, was a legislative act which the Supreme Court cannot review in suit to enjoin the enforcement of municipal liens.

Municipal Corporations — Improvement — Objections — Showing of Record.

10. Where objections to a municipal street improvement involved questions of fact, the record must affirmatively show a finding upon them by the council.

Municipal Corporations — Street Improvement — Creation of Assessment District—Reassessment.

11. The failure of the council of a city to create an assessment district for a street improvement prior to performance of the work did not preclude reassessment under the city charter to charge the property benefited with a portion of the cost commensurate with the special benefits.

Evidence—Judicial Notice—Municipal Ordinance.

12. The Supreme Court cannot take judicial knowledge of the existence of a city ordinance requiring contracts for street improvements to be let to the lowest bidder.

Municipal Corporations — Street Improvement — Single Contract for Paving, Curbing, etc.

13. It was within the discretion of the city council to let, in one contract for a street improvement, the work of excavation, drainage and curbing, all incidental to the paving.

Municipal Corporations—Street Improvement—Competitive Bidding—Patented Material—License to Use.

14. That the city recorder, on filing by the owner of the patent, of license for the use of its patented gravel bitulithic pavement, put the paper where it was not readily found, and indexed it in a way which did not assist in the search for it, does not warrant ignoring it in determining whether the principle of competitive bidding was violated in the city's contract for such material improvement.

Municipal Corporations — Street Improvements — Reassessments — Retroactive Powers.

15. The voters of a city, in amending its charter to give the city power to make reassessments for street improvements, could make such powers retroactive.

Municipal Corporations — Reassessments — Charter Amendment—Construction.

16. Remedial legislation, as an amendment to a city's charter empowering it to make reassessments for street improvements, must be construed so as to effectuate the purpose of the electors in adopting it.

Municipal Corporations—Street Improvement—Waiver of Defect.

17. Property owners who applied to pay street improvement liens on their property in ten annual installments, and, as required by

Section 3245, L. O. L., expressly waived in their applications irregularity or defect, jurisdictional or otherwise, in the proceedings to improve the street, were concluded by such waiver, though a reassessment for the improvement was unauthorized.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

This is a suit brought to enjoin the defendants from enforcing municipal liens imposed on the property of plaintiffs to pay 75 per cent of the cost of a street improvement. The case grows out of the same improvement as that involved in *Birnie* v. *La Grande,* 78 Or. 531, 537 (153 Pac. 415). It was there held that "to cure the invalidity in the proceedings it was necessary that they be had *de novo.*" After the decision in that case an attempt was made to amend the charter of the City of La Grande at an election held December 13, 1915. The amendment undertook to incorporate the following provisions in the charter:

"Whenever an assessment for the opening, altering, grading, paving or improving of any street or alley or the construction, reconstruction or repair of any sewer, water drain, ditch or conduit, or any kind of local improvement has been or may hereafter be made by the City of La Grande upon or against the property abutting upon, contiguous or adjacent or tributary to or benefited by such improvement and such assessment or any part thereof has been or shall hereafter be set aside, annulled, declared or held void or its enforcement refused or enjoined by any court of this state or any court of the United States having jurisdiction therein, whether directly or by virtue of any decision of such court or when the commission of the City of La Grande shall be in doubt as to the validity of such assessment or any part thereof, the commission of said city may, by ordinance, make a new assessment or reassessment upon the lots, blocks, or parcels of land which have been benefited or may be benefited by such improvement. Such assessment or reassessment shall be based upon the special bene-

fits of such improvement to the respective lots, blocks or parcels of land assessed or reassessed at the time of its original making, but shall not exceed the amount of such original assessment with interest thereon from date of the delinquency of the original assessment which may be added at the discretion of the commission.

"Such reassessment shall be made in an equitable manner as nearly as may be in accordance with the law in force at the time it is made, but the commission may adopt a different plan of apportionment of benefits, when in their judgment essential to secure an equitable reassessment.

"The proceedings required by this charter to be had prior to the making of the original assessment shall not be required to be taken or had within the intent of this section. Any such reassessment shall be made and shall become a charge upon the property upon which the same is levied, notwithstanding the omission, failure or neglect of any officer, body or person to comply with the provisions of this charter connected with or relating to such improvement and original assessment and notwithstanding the proceedings of the commission or any officer of the city or contractor or other person connected with such work or improvement may have been irregular or defective, whether such irregularity or defect be jurisdictional or otherwise. Such reassessment shall not be made in case of a street or alley improvement wherein a remonstrance, sufficient in law to defeat the original improvement, shall have been filed prior to the making of the improvement."

The amended charter further provided a procedure for the making of such reassessment. In March, 1916, the council proceeded to reassess the property benefited by the improvement.

Plaintiffs claim that the reassessment proceedings were ineffectual and that the enforcement of the liens alleged to arise out of the reassessment should be en-

joined. The Circuit Court dismissed the complaint and the plaintiffs appeal. AFFIRMED.

For appellants there was a brief over the names of *Mr. Turner Oliver* and *Messrs. Cochran & Eberhard,* with oral arguments by *Mr. Oliver* and *Mr. George T. Cochran.*

For respondent, Warren Construction Company, there was a brief filed over the name of *Mr. John P. Rusk,* with an oral argument by *Mr. Rusk.*

For respondents, City of La Grande and its officers, there was a brief over the name of *Mr. John D. Slater,* City Attorney, with an oral argument by *Mr. Slater.*

McCAMANT, J.—1, 2. A preliminary question is discussed in the briefs as to the validity of the amendment of the charter attempted in December, 1915. The proceedings in connection with the amendment have not been received in evidence. The amended complaint, after referring to the amendment of the charter made in 1913, alleges:

"That thereafter on December 13th, 1915, upon initiative petition, there was attempted to be enacted and passed by a majority vote of the legal voters of the said City of La Grande, at an election duly and regularly held in said city for said purpose a 'Proposed Amended Charter of the City of La Grande, Union County, State of Oregon,' the title of said act being 'An Act to Amend the Charter of the City of La Grande, in Union County, Oregon,' with the words added thereto as follows: 'Shall the proposed amendment of the charter of the City of La Grande, Oregon, including the amendment of said charter providing for reassessment for street improvements already made be adopted?' a true and correct copy of said so-called amended charter is hereto attached marked Ex-

hibit 'C' and is made a part of this amended complaint."

Elsewhere the pleader speaks of the charter of 1915 as the "amended city charter." The only allegation in the amended complaint which specifically attacks the procedure by which the amendment was made is the following:

"That said pretended amendment above set out and contained in the said pretended Charter of 1915, is not germane to the ballot title of said pretended Amended Charter, and said ballot title was and is misleading, and that the whole of said pretended amendment was and is void."

On the trial of the cause counsel for plaintiffs made the following admission:

"The document marked C is called the Proposed Amended Charter of the City of La Grande, of December 13, 1915, is the document under which the present commission of La Grande is acting, is the present city charter. We do not admit they are regularly passed, but we admit they are what they purport to be to that extent."

In this condition of the record plaintiffs are entitled at most to a determination of the sufficiency of the title of the act and of the ballot title under which the amended charter was submitted to the voters of La Grande. They admit that the 1915 charter is that under which the city is now operating. If they claim it is invalid for any reason they should point out the ground of the invalidity. The ballot title was as follows:

"Shall the proposed amendment of the charter of the City of La Grande, Oregon, including the amendment of said charter providing for reassessment for street improvements already made be adopted?"

The title of the act is as follows:

"An Act to Amend the Charter of the City of La Grande, in Union County, State of Oregon."

It is held that the provisions of state Constitutions on the subject of titles and styles of acts have no application to municipal ordinances: *Colby* v. *Medford,* 85 Or. 485, 508 (167 Pac. 487); *Ex parte Haskell,* 112 Cal. 412 (44 Pac. 725, 727, 32 L. R. A. 527); *City of Tarkio* v. *Cook,* 120 Mo. 1 (25 S. W. 202, 41 Am. St. Rep. 678); 28 Cyc. 378. The first of the above cases expressly holds that the provisions of the Oregon Constitution on this subject have no application to measures for the amendment of city charters. We think that the title of the act is sufficient.

The ballot title expressly directed attention to the amendment to the charter authorizing these assessments. It was sufficient within the rule announced in *State* v. *Langworthy,* 55 Or. 303, 312 (104 Pac. 424; 106 Pac. 336). The amended complaint admits that the election at which the charter was adopted was duly and regularly held. It follows from this admission that every voter received a copy of the proposed amendment with the official arguments, if any, for and against its adoption: Sections 3478, 3480. We must assume that the electors voted intelligently and there is nothing in the record to impeach the validity of their action.

The amendment on the subject of reassessments is substantially identical with Section 400 of the Portland Charter which has been construed in *Kadderly* v. *Portland,* 44 Or. 118, 159, 160 (74 Pac. 710, 75 Pac. 222); *Duniway* v. *Portland,* 47 Or. 103, 108–112 (81 Pac. 945); *Hughes* v. *Portland,* 53 Or. 370, 383–393 (100 Pac. 942); *Terwilliger Land Co.* v. *Portland,* 62 Or. 101, 111 (123 Pac. 57); *Wilson* v. *Portland,* 87 Or. 507 (169 Pac. 90, 92, 171 Pac. 201). It is also substan-

tially identical with Section 132a of the Medford Charter which was construed in *Phipps* v. *Medford,* 81 Or. 119 (156 Pac. 787, 158 Pac. 666). These decisions cover the whole subject of reassessment and leave little for us to do in this case except to apply the principles announced to the facts disclosed by this record.

3. The amended charter provides:

"Such reassessment shall not be made in case of a street or alley improvement wherein a remonstrance, sufficient in law to defeat the original improvement, shall have been filed prior to the making of the improvement."

Two remonstrances were filed by property owners prior to the making of the improvement, but the charter of 1909 which was then in force contained no provision whereby a remonstrance was effectual to defeat an improvement. We think that the language above quoted is for this reason without application to these remonstrances. It is provided in subdivision 5 of Section 10 of the Charter of 1915,

"that if the owners of fifty-five per cent of the property to be affected by said improvement, measured by the front foot, object to such improvement, the Commission shall be ousted of jurisdiction for a period of six months thereafter."

The language in the reassessment provisions of the Charter of 1915 on the subject of a remonstrance is referable only to this provision of the same charter.

4. It is claimed that the original proceeding was fraudulent and that for this reason a reassessment could not be made. The evidence fails to sustain plaintiff's allegations of fraud. Furthermore, it is held in *Duniway* v. *Portland,* 47 Or. 103, 112 (81 Pac. 945), that the fraud which will defeat a reassessment is fraud of the council in the reassessment proceeding. There is no evidence of such fraud in this case.

5, 6. Plaintiffs contend that the original contract under which the work was done was void for a number of reasons and that this fact precludes a reassessment. It was held in *Birnie* v. *La Grande,* 78 Or. 531 (153 Pac. 415), that the council never acquired jurisdiction to proceed with the improvement and it follows from this circumstance that the contract was void. A lack of jurisdiction in the original proceeding will not defeat the reassessment: *Nottage* v. *Portland,* 35 Or. 539 (58 Pac. 883, 76 Am. St. Rep. 513); *Phipps* v. *Medford,* 81 Or. 119 (156 Pac. 787, 158 Pac. 666); *Wilson* v. *Portland,* 87 Or. 507 (169 Pac. 90, 171 Pac. 201). The fact that the work was done under a void contract will not preclude a reassessment of the property where the statute authorizes such reassessment: 2 Page and Jones on Taxation by Assessment, 961; *Cawker* v. *Milwaukee,* 133 Wis. 35 (113 N. W. 417); *Tuttle* v. *Polk,* 84 Iowa, 12 (50 N. W. 38, 39, 40); *St. Paul* v. *Mullen,* 27 Minn. 78 (6 N. W. 424); *State* v. *District Court,* 102 Minn. 482 (113 N. W. 697, 700 114 N. W. 654).

It is argued that the work done does not conform to the plans and specifications, but the preponderance of the testimony is with defendants on this issue.

7. It is contended that the price to be paid for the work was excessive. As to this contention it is enough to say that the price is not so grossly excessive as to imply fraud and in the absence of such a situation the price was within the discretion of the council.

8. Plaintiffs contend that the improvement did not benefit their property and that therefore the council had no right to reassess for the collection of its cost. Plaintiffs produce cogent testimony to the effect that the improvement is out of proportion to the value of their property. If we had jurisdiction to review the

legislative acts of the council, this record would appeal to us persuasively, but we have no such jurisdiction. It was for the council to determine what streets in La Grande should be smooth-surfaced. Before making the final reassessment the defendants fixed a time for hearing objections thereto and published a notice for three weeks, as required by the 1915 charter. This notice directed the attention of property owners interested to the preliminary assessments on file in the office of the city recorder and notified them of the time set for the hearing of objections.

Written objections were filed and at the time stated in the notice and at an adjourned meeting of the council held for such purpose plaintiffs appeared by counsel and furnished testimony in support of their objections. The council duly heard the testimony and argument of plaintiffs and thereupon determined that the property in the district fixed by a previous ordinance was specially benefited by the improvement to the extent of 75 per cent of the amounts severally assessed at the time the improvement was made.

9. In 1 Page and Jones on Taxation by Assessment, 533, it is said:

"The question of benefit to the property owner is not a judicial question unless the court can plainly see that no benefit can exist and this absence of benefit is so clear as to admit of no dispute or controversy by evidence."

Plaintiffs' testimony does not meet these requirements. That we cannot review the action of the council in the matter of benefits so determined is taught by *Hughes* v. *Portland,* 53 Or. 370, 394 (100 Pac. 942), and *Phipps* v. *Medford,* 81 Or. 119, 131, 132 (156 Pac. 787, 158 Pac. 666). The objections of these plaintiffs do not go to the matter of the apportionment of the

cost of the improvement among the owners of abutting property. Plaintiffs contend that the council erred in fixing the district to which the expense should be chargeable. This determination is a legislative act which the court cannot review: *Bauman* v. *Ross,* 167 U. S. 548, 589, 590 (42 L. Ed. 270, 17 Sup. Ct. Rep. 966); *Ellwood* v. *Rochester,* 122 N. Y. 229 (25 N. E. 238); *Chicago Co.* v. *Centerville,* 172 Iowa, 444 (153 N. W. 106, 107, 154 N. W. 596); *Rolph* v. *Fargo,* 7 N. D. 640 (76 N. W. 242, 251, 42 L. R. A. 646); *King* v. *Portland,* 38 Or. 402, 414 (63 Pac. 2, 55 L. R. A. 812); Cooley on Taxation (2 ed.), 149.

10. It is the rule in this jurisdiction that where objections to a municipal improvement involve questions of fact, the record must affirmatively show a finding upon them by the council: *Applegate* v. *Portland,* 53 Or. 552, 555, 556 (99 Pac. 890). It is intimated in *Hughes* v. *Portland,* 53 Or. 370, 388 (100 Pac. 942), that is should appear either in the original proceeding or in that brought for reassessment purposes that the objections raised by property owners in so far as they involve questions of fact have been heard and determined by the council.

The record shows that two protests were filed prior to the making of the improvement and a third one was directed against the reassessment. The first of these was filed by Turner Oliver, October 16, 1912. It urged that the price to be charged for the work was excessive and that the contract was to be let without competition. The second protest, signed by sundry property owners, was filed April 2, 1913. It alleged that the price named in the contract with Warren Construction Company was excessive and that the specifications were not sufficiently precise. The third protest, filed April 5, 1916, made the following contentions:

1. Want of jurisdiction to reassess because of adjudications that the proceedings taken were ineffectual;
2. Failure of the council to create an assessment district prior to the making of the improvement, in the manner prescribed by the charter or at all;
3. Want of jurisdiction to make the improvement originally;
4. Want of jurisdiction to contract with Warren Construction Company;
5. Lack of authority to reassess under the charter as amended in 1913;
6. Lack of power in the voters of La Grande so to amend the charter in 1915 as to authorize this reassessment, also inadequacy of the amendment to justify the action taken by the council;
7. Lack of power in the council to levy a reassessment in excess of the special benefits;
8. That the improvement as made did not comply with the plans and specifications;
9. That the Warren Construction Company had waived interest on the warrants issued to it and that the property owners should therefore be charged no interest.

11. These protests for the most part raised questions of law. The only questions of fact presented by them are that the price charged for the work was excessive, that the work was not done in accordance with the plans and specifications, that interest had been waived on the warrants and was therefore not chargeable on the reassessment, and that the council had failed to create an assessment district prior to the performance of the work. The first and the last of these objections were insufficient in law and therefore required no notice from the council. In the absence of fraud the price to be paid for the improvement was a matter within the discretion of the council. The failure of the council to create an assessment district

prior to the performance of the work did not preclude a reassessment for the purpose of charging the property benefited with a portion of the cost commensurate with the special benefits: *Thayer Lumber Co.* v. *Muskegon,* 157 Mich. 424 (122 N. W. 189); *Wiese* v. *South Omaha,* 100 Neb. 492 (160 N. W. 890).

The other questions of fact were passed on by the council either directly or inferentially as will appear from the following recitals in the Resolution of Reassessment:

"The commission now finds that the said improvement of Fourth Street, as set out in said Resolution of March 1, 1916, was constructed substantially in accordance with the plans, specifications and contract therefor; that the total cost of such improvement was the sum of $41,317.46; that the property in said reassessment district Number 54 mentioned and described and reassessed in the said preliminary reassessment was specially benefited by the improvement of the said Fourth Street as set out in said Resolution of March 1, 1916, to the extent of 75 per cent of the several amounts assessed to each separate lot, parcel or tract of real estate in and by said reassessment without interest thereon."

It will be noted that the property owners were relieved of the interest burden and also of 25 per cent of the amount of the original liens.

12. It is held in *Terwilliger Land Co.* v. *Portland,* 62 Or. 101, 110, 111 (123 Pac. 57), that where a contract for a municipal improvement is let without competition in violation of a charter requirement which provides that it be let to the lowest bidder, the improvement is so charged with illegality that it cannot form the basis of a reassessment. Plaintiffs claim that this principle is fatal to the reassessment in the case at bar. In the Terwilliger Land Company case and the other Oregon cases which have followed it, the decisions are based

on charter requirements that the contracts be let to the lowest bidder. We find no such provision in the La Grande charter of 1909, under which this work was done. On the contrary, by Section 37 of this charter the council is granted plenary power "to grade, pave, * * curb or otherwise improve the * * streets * * of the City." It is argued in one of plaintiffs' briefs that there was a municipal ordinance which required the letting of contracts to the lowest bidder, but no such ordinance was offered in evidence nor was it pleaded in the manner required by Sections 90 and 3244, L. O. L. We cannot take judicial knowledge of the existence of such an ordinance: *Pomeroy* v. *Lappeus,* 9 Or. 363, 364; *Dailey* v. *Cremen,* 80 Or. 183, 188 (156 Pac. 797).

13, 14. Assuming without deciding that it was the duty of the municipal authorities to let contracts for street improvements through competitive bidding, it does not appear that this principle was violated in the contract made with the Warren Construction Company. It is established that on May 10, 1912, Warren Brothers Company filed with the city recorder a license for the use of its patented Gravel Bitulithic Pavement almost identical with that upheld by this court in *Johns* v. *Pendleton,* 66 Or. 182 (133 Pac. 817, 134 Pac. 312, Ann. Cas. 1915B, 454, 46 L. R. A. (N. S.) 990). The price exacted under the license is identical with that approved in the foregoing case. The doctrine of *Johns* v. *Pendleton* has been approved in *Sherrett* v. *Portland,* 75 Or. 449, 463 (147 Pac. 382), and *Temple* v. *Portland,* 77 Or. 559, 563 (151 Pac. 724). This latter case is invoked by plaintiffs as an authority to support their contention that the contract was let in this case without real competition. The cases are alike only in the fact that in each case a patented

pavement was specified. In the Temple case the owner of the patent had filed no license authorizing bidders to use the patented material; moreover, the work included the laying of sidewalks and bids were called for in such a way as to preclude the construction of the sidewalks by anyone other than the owner or licensee of the patent. The illegality of the contract in the Temple case was predicated in part on the fact that "a considerable and substantial portion of the improvement could have been segregated from the Hassam pavement" and that this was not done. The contract under which the work in the instant case was done called for no sidewalks. The excavation, drainage and curbing provided for in the contract were all incidental to the paving. It was clearly within the discretion of the council to let the work in one contract.

Some question is made as to the filing of the license by Warren Brothers Company, but plaintiffs have established nothing in this branch of their case except that the city recorder put the paper where it was not readily found and that he indexed it in a way which did not greatly assist in the search. These are insufficient reasons for ignoring it.

Plaintiffs rely largely on *McMillan* v. *Barber Asphalt Co.,* 151 Wis. 48 (138 N. W. 94, Ann. Cas. 1914B, 53). The contract in that case was tainted with fraud in that it was secured by the bribery of a councilman. Pending proceedings to enjoin its performance the city completed the work and the contract was subsequently held fraudulent and illegal by the court of last resort. The case holds that a work done under an unlawful contract cannot be made the basis of a reassessment proceeding. It is difficult to reconcile this case with the opinion of Mr. Chief Justice WOLVERTON in *Duniway* v. *Portland,* 47 Or. 103, 112

(81 Pac. 945); in any event the case at bar is wholly unlike the Wisconsin case in its facts. The contract under which the work was done in the instant case was void for the reasons pointed out in *Birnie* v. *La Grande,* 78 Or. 531 (153 Pac. 415), but it was neither fraudulent nor illegal.

15, 16. We must assume that the people of La Grande acted intelligently when they amended their charter in 1915; that they intended to vest the city with the powers possessed by Portland and by Medford, powers well defined by the decisions of this court. It was competent to make these powers retroactive and the amendment adopted had that effect: *Nottage* v. *Portland,* 35 Or. 539, 552 (58 Pac. 883, 76 Am. St. Rep. 513); *Kadderly* v. *Portland,* 44 Or. 118, 159, 160 (74 Pac. 710, 75 Pac. 222). The far-reaching effect of the amendment of the charter on the subject of reassessment is clearly pointed out by Mr. Justice BURNETT in *Phipps* v. *Medford,* 81 Or. 119, 130 (156 Pac. 787, 158 Pac. 666). The legislation is remedial and is to be construed in such manner as to effectuate the purpose of the electors in adopting it: *Nottage* v. *Portland,* 35 Or. 539, 548 (58 Pac. 883, 76 Am. St. Rep. 513). The city authorities in making the reassessment conformed strictly to the procedure prescribed by their amended charter and the lower court did not err in adjudging the validity of the liens created by the reassessment.

17. The plaintiffs Hansen, Horstman and Eastman made application to pay the liens levied on their property in ten annual installments. As required by Section 3245, L. O. L., their applications contained the following waiver:

"I hereby expressly waive all or any irregularity or defect, jurisdictional or otherwise, in the proceedings to improve said street."

This waiver is alleged in the answer and established by the proof. These three plaintiffs are concluded by this circumstance, even if their contentions were otherwise meritorious: *Parker* v. *Hood River,* 81 Or. 707, 709, 710 (160 Pac. 1158).

The decree is affirmed.

AFFIRMED. REHEARING DENIED.

Argued at Pendleton May 7, affirmed June 11, rehearing denied June 25, 1918.

DAVIDSON *v.* MADDEN.

(173 Pac. 320.)

Trial—Instructions—Responsiveness to Issues.

1. The refusal of instructions requested upon the assumption that a chattel mortgage executed by defendant's partner to plaintiff was invalid because it attempted to hypothecate an undivided half interest in partnership property to secure an individual debt was not error, where defendant's liability was predicated upon another contract.

Contracts—Contract to Pay Another's Debt—Consideration.

2. An agreement whereby one partner took over all of the other's interest in the partnership property, agreeing to pay the other's personal debts, to which the plaintiff creditor assented, was valid; the inducement being sufficient to uphold it.

Appeal and Error—Verdicts—Conflicting Evidence.

3. The jury's determination from conflicting evidence that defendant took over all the partnership property under an agreement to pay his partner's debt to plaintiff must be considered final.

Contracts—Nonsuit—Variance—Consideration.

4. That a complaint charged that in consideration of plaintiff's forbearance to foreclose his mortgage on defendant's partner's partnership interest defendant agreed to pay the amount of a certain note secured by chattel mortgage, and plaintiff testified he did not agree to postpone foreclosure, did not render denial of nonsuit erroneous, where judgment for plaintiff could rest on other considerations.

Appeal and Error—Harmless Error.

5. That an instruction on one partner's agreement to assume the personal debts of another improperly refers to taking and accepting "the sheep," instead of "an undivided half interest in the sheep," *held* harmless error.

Contracts—Rights of Action—Contract for Benefit of Third Persons.

6. Where a person as full or part consideration for an executed contract, promises another to assume, pay or discharge some legal debt due from such other to a third person, the latter, though a stranger to the consideration and not an immediate party to the contract, may maintain an action thereon if the agreement was made directly or primarily for his benefit.

[As to promises for the benefit of third persons, see notes in 3 Am. Dec. 305; 9 Am. Dec. 155; 35 Am. St. Rep. 269; 71 Am. St. Rep. 178.]

From Gilliam: DAVID R. PARKER, Judge.

In Banc.

This is an action by L. P. Davidson against John Madden to recover money. The complaint alleges in effect that on November 9, 1910, the defendant's brother, New Madden, executed to the plaintiff a promissory note for $3,000, payable upon demand with interest from date until paid at the rate of 10 per cent per annum; that in order to secure the payment of the note, the maker thereof, at the time it was given, also executed a chattel mortgage of his undivided half interest in a band of 1,700 ewes and lambs, then marked with the letter V having a short horizontal bar across it; that the mortgage was duly recorded the day it was executed in Gilliam County, Oregon, where the sheep were then kept; that on March 21, 1911, New Madden made a contract with the defendant, whereby the latter stipulated to purchase such undivided half interest in the sheep, subject to the mortgage thereon; that thereafter the defendant promised and agreed to assume and pay plaintiff the amount of such promissory note, and in consideration of the latter's consent to New Madden's transfer of such interest in the flock to the defendant, and in further consideration of the plaintiff's forbearance to foreclose his mortgage, the defendant assumed and promised to pay the amount of the note to the plaintiff; that as a part of the same

transaction, New Madden bargained, sold and delivered his undivided half interest in the sheep to the defendant, who accepted such property and took possession thereof, and as a part of the purchase price then assumed and agreed to pay the amount of the promissory note to the plaintiff; that thereafter such sheep were sold, transferred, became lost, or died, and the lien of the mortgage thereon was rendered nugatory by the acts of the defendant; that the note long since matured but no payments have been made thereon except $609 November 9, 1910, and $500 October 10, 1915. Judgment was demanded for the remainder due on the note. After the complaint was filed another payment of $200 was made on the debt.

The answer denied some of the averments of the complaint and for a further defense substantially alleged that about November 1, 1909, the defendant paid an indebtedness of $2,665.58, which New Madden then owed for the purchase of 725 ewes and 612 lambs, that were marked as stated in the complaint, which sheep then embraced the entire flock then owned by New Madden; that about November 1, 1909, the defendant added to such band then belonging to his brother 283 ewes and 11 bucks marked by a "spur heel"; that on such date in order properly to care for the combined flocks, New Madden and the defendant entered into a partnership agreement, by the terms of which the profits and losses were to have been equally shared, after the payment to the defendant of the sum of $286.50 out of the first year's profits derived from the business; that New Madden was to devote his entire time and attention to the care and management of the sheep while the defendant was to look after the financial part of the venture; that pursuant to such partnership, additions were made to the band of sheep,

the wool obtained therefrom was sold from time to time until March 17, 1915, when the remainder of the proceeds of all sales of sheep, lambs, bucks and wool was finally divided and paid over to the respective parties; that about November 10, 1910, without the knowledge, consent or authority of the defendant, New Madden, in order to evidence his personal indebtedness, gave the promissory note described in the complaint, and to secure the payment of such instrument, he executed a chattel mortgage of the sheep and lambs which were partnership property; and that the defendant at no time, individually or as a partner, ever agreed to become a party to the note or mortgage, and whatever payments have been indorsed upon the note were made by New Madden.

The material allegations of new matter in the answer having been denied by the reply, a trial was had resulting in a verdict and judgment for the plaintiff as prayed for in the complaint, and the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. D. N. Mackay* and *Mr. T. A. Weinke,* with an oral argument by *Mr. Mackay.*

For respondent there was a brief over the name of *Messrs. Shanks & Horner,* with an oral argument by *Mr. C. R. Horner.*

MOORE, J.—1, 2. Exceptions having been duly saved, it is maintained by defendant's counsel that errors were committed in denying their requests to charge the jury as follows:

1. "I instruct you that a partnership is under no obligation for the individual debts of its members, and

hence a partner cannot use the firm assets to pay his individual debts without their consent, nor can he pledge the firm credits for such debts."

2. "I further instruct you that a partner's interest in the partnership property is only his proportionate share of what remains after the payment of the partnership debts. He has no such distinct interest in any distinct parcel of the partnership property as enables him to pledge it for his own debts. Such interest in a part of the firm assets is too remote and indeterminate to admit of its being conveyed as security or otherwise."

If the language thus employed affords a correct statement of the rules of law which are applicable in some classes of cases, it is difficult to understand how these requested instructions are important in this instance. If it be assumed that the chattel mortgage which was executed by New Madden to the plaintiff was invalid because it attempted to hypothecate an undivided half interest in partnership property, to secure the payment of an individual debt of one of the partners, without the knowledge or consent of his associate in business, a subsequent agreement by these persons that in consideration of New Madden's surrender to John Madden of all his interest in the sheep, the defendant agreed to pay New Madden's debts, and the plaintiff assented to such agreement, the inducement to the contract was sufficient to uphold it: *Baker & Smith* v. *Eglin,* 11 Or. 333 (8 Pac. 280); *Feldman* v. *McGuire,* 34 Or. 309 (55 Pac. 872).

3. The defendant's motion for a judgment of nonsuit was denied, but we understand the question thus involved relates to the alleged invalidity of the chattel mortgage for the reason stated, and not to any lack of proof on the part of the plaintiff to substantiate the averment of the complaint, to the effect that for the

consideration stated the defendant assumed and agreed to pay New Madden's debts. Though the defendant, as a witness, denied that he ever agreed to undertake the payment of any of the indebtedness due from his brother, the testimony of the plaintiff is to the contrary. Davidson's testimony is corroborated in many particulars by that of other witnesses. From this dispute the jury determined the issue in favor of the plaintiff, and their conclusion must be accepted as the final arbitrament of the matter.

4. It will be remembered that the complaint charged that in further consideration of the plaintiff's forbearance to foreclose his mortgage, the defendant assumed and agreed to pay the amount of the promissory note secured by the mortgage. The plaintiff testified that he never agreed to postpone the enforcement of the lien upon the sheep and lambs, though no action was instituted on the defendant's alleged engagement to pay the indebtedness until about six years after the interest in the mortgaged property is alleged to have been assigned to him. The testimony so adverted to does not render the denial of the motion for a judgment of nonsuit erroneous, for the final conclusion that was reached herein can well rest upon the averment in the complaint that in consideration of New Madden's transfer of his undivided half interest in the sheep and lambs to the defendant, the latter assumed and agreed to pay the mortgage debt.

5. An exception having been taken to the following instruction it is insisted by defendant's counsel that an error was committed in giving it:

"If you find from a preponderance of all the evidence that the defendant John Madden took the sheep after New Madden, the mortgagor, had told him he could do so by paying certain indebtedness of said New Madden, including the indebtedness to L. P. Davidson

as represented by the balance then due on the promissory note of New Madden, and if you further find that John Madden accepted the sheep with that understanding, in that event I instruct you that John Madden, the defendant, would be liable for the amount of the indebtedness covered by this note, and your verdict should be for the plaintiff."

It is admitted that the sheep and lambs described in the mortgage were partnership property, of which John Madden as a partner owned an equal undivided interest. The defendant was therefore in possession of the entire flock, as much so as New Madden. The part of the instruction last quoted substantially states that if the jury found the defendant "took" the sheep after New Madden had told him he could do so, and if it was further found that John Madden "accepted" the sheep pursuant to his agreement to pay the indebtedness mentioned, then a verdict should be returned for the plaintiff, improperly refers to taking and accepting the sheep, when that part of the charge should have alluded to the taking and accepting of the remaining undivided half interest in these animals, since prior thereto the defendant had taken possession of and was with New Madden holding the entire band of sheep. Though a verbal inaccuracy is to be found in the language employed in the instruction thus challenged, it is believed the jury were not misled thereby and clearly understood the meaning intended to be conveyed. No objection is to be found in the brief of defendant's counsel to the terms so used.

6. The rule is established in Oregon that where a person as a full or part consideration for an executed contract, promises another to assume, pay or discharge some legal debt or obligation due from such other to a third person, the latter, though a stranger to the

consideration and not an immediate party to the contract, may maintain an action thereon if the agreement was made directly or primarily for his benefit: *Hughes* v. *Oregon Ry. & Nav. Co.,* 11 Or. 437 (5 Pac. 206); *Schneider* v. *White,* 12 Or. 503 (8 Pac. 652); *Chrisman* v. *State Ins. Co.,* 16 Or. 283 (18 Pac. 466); *Parker* v. *Jeffery,* 26 Or. 186 (37 Pac. 712); *Washburn* v. *Interstate Inv. Co.,* 26 Or. 436 (36 Pac. 533, 38 Pac. 620); *Young Men's Christian Assn.* v. *Croft,* 34 Or. 106 (55 Pac. 439, 75 Am. St. Rep. 568); 48 Cent. L. J. 455; *Feldman* v. *McGuire,* 34 Or. 309 (55 Pac. 872).

In the case at bar New Madden's transfer of his undivided partnership interest in and to the mortgaged sheep and lambs to John Madden, was a sufficient consideration for the latter's agreement to assume and pay his brother's indebtedness to the plaintiff, who can legally maintain an action thereon.

It follows that the judgment should be affirmed and it is so ordered. AFFIRMED. REHEARING DENIED.

Argued May 29, affirmed June 25, 1918.

FIRST SAVINGS BANK OF ALBANY *v.* MACNEILL.

(173 Pac. 573.)

Trial—Direction of Verdict—Conflicting Evidence.

1. Where there was evidence upon both sides of the issue, the judge properly refused to give a peremptory instruction.

Appeal and Error—Scope of Review—Conflicting Evidence.

2. Where there is evidence upon both sides of the issue, the court on appeal is powerless to disturb the verdict.

From Linn: PERCY R. KELLY, Judge.

Department 1.

The First Savings Bank, a corporation, brought this action to recover on a promissory note which the defendant, John Macneill, had executed and delivered to the bank.

In his answer Macneill alleged that the note was without consideration and that he had been induced to sign it through fraud and deceit. The bank claimed that the note was given on account of delinquent interest due from a third party. The verdict of the jury was for the defendant and the plaintiff appealed.

Affirmed.

For appellant there was a brief over the names of *Messrs. Weatherford & Weatherford* and *Mr. Edward F. Bailey,* with an oral argument by *Mr. James K. Weatherford.*

For respondent there was a brief over the name of *Messrs. Hill & Marks,* with an oral argument by *Mr. Gale S. Hill.*

PER CURIAM.—1, 2. The plaintiff requested the court to instruct the jury to return a verdict for it for the amount of the note together with whatever sum might be found to be reasonable as attorney's fees. The refusal to give this requested instruction is the only error assigned by the plaintiff. There was evidence to support the position of the plaintiff and there was also evidence to support the position taken by the defendant; and since there was evidence upon both sides of the issue the circuit judge properly refused to give the instruction requested by the plaintiff and for the same reason we are powerless to disturb the verdict of the jury: *Sullivan* v. *Wakefield,* 65

Or. 528, 535 (133 Pac. 641); *West* v. *Kern*, 88 Or. 247 (171 Pac. 413, 416, 1050). Unquestionably, the jurors understood what they were called upon to decide, for the instructions given by the trial court were clear and complete and were fair to both litigants. A discussion of the evidence would serve no good purpose but it is sufficient to say that the entire record has been examined; and since there was evidence for the defendant as well as evidence for the plaintiff, and no prejudicial error occurred during the trial, the verdict of the jury is conclusive upon us and the necessary result is that the judgment appealed from must be affirmed. AFFIRMED.

BEAN, J., sitting for MCBRIDE, C. J.

Argued June 18, reversed and writ dismissed June 25, 1918.

DRYDEN *v.* DALY.

(173 Pac. 667.)

Pleading—Conclusions of Law.

1. The pleader should state facts upon which he bases his right to recover, rather than conclusions of law.

Pleading—Conclusions of Law.

2. In *mandamus* by city employee to compel reinstatement under civil service rules, the allegation that "the position of calker and the position of meterman and tapper are positions within the definition of said class K, and that the plaintiff and petitioner was duly examined, classified and appointed as required by the charter provisions and rules and regulations of the civil service board of the City of Portland," is a mere conclusion of law.

[As to *mandamus* to restore officer unlawfully removed, see note in 12 Am. Dec. 28.]

Mandamus—Right to Remedy—Existence of Duty.

3. The writ in *mandamus* which constitutes the only initiatory pleading on the part of plaintiff under Section 618–620, L. O. L., must clearly indicate a present unperformed duty on the part of the defendant requisite for the preservation of the rights of the plaintiff,

and is not aided by the petition either in the original or supplemental form.

Mandamus—Right to Remedy—Vain Act.

4. Where plaintiff brought *mandamus* to compel reinstatement in municipal employ, and prior to the hearing he was restored to employment, the court was not required to do the vain thing of issuing the peremptory writ.

Appeal and Error—Want of Actual Controversy—Mandamus.

5. In *mandamus* to compel reinstatement of plaintiff in municipal employ, even so late as when the cause reaches the Supreme Court on appeal, the fact of plaintiff's voluntary reinstatement may be made to appear, and the court in such case will refuse to proceed further.

Mandamus—Right to Remedy—Existence of Other Remedy.

6. Conceding that a municipal employee was wrongfully discharged he had an adequate remedy at law by an action against the city for damages, and therefore could not maintain *mandamus* to compel his reinstatement.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

On the petition of the plaintiff the Circuit Court of Multnomah County issued an alternative writ of *mandamus* to the defendant Daly as Commissioner of Public Utilities and Franchises of the City of Portland, to L. S. Kaiser as superintendent and to E. J. Gray as general foreman of the Water Department of that municipality. The document recites the municipal character of the city, the official tenure of Daly, and states that Kaiser as superintendent and Gray as general foreman of the Water Department are both subordinate to and under the control of Daly. It is said that the petitioner is a regularly and legally examined, appointed and classified calker and meterman and tapper "under the civil service laws, charter and rules and civil service rules and regulations of the said City of Portland, and is senior in examination, classification, appointment and employment" in all of such characters. The writ quotes Sections 106 and 107 of the Charter of Portland, the substance of which is that

persons in one classification shall not be employed in another class without being regularly examined as if applying for a position for the first time, and that promotion shall be made according to seniority. It is also stated that the Board of Civil Service Commissioners of Portland established Class K, including therein "Skilled Labor Service," making it apply to "positions requiring knowledge of a trade, craft or useful art, or requiring special manual or mechanical skill, or involving supervision of skilled or unskilled laborers."

The pith of the plaintiff's grievance is included in the fifth and sixth allegations of the writ, reading thus:

V. "That the position of Calker and the position of Meterman and Tapper are positions within the definition of said Class K, and that plaintiff and petitioner was duly examined, classified and appointed as required by the charter provisions and the rules and regulations of said civil service for the City of Portland, and that said examination of your petitioner and his appointment and classification was had and made on or about the 16th day of March, 1909."

VI. "That since the 1st day of February, 1916, the defendants and each of them have violated the said civil service charter provisions and laws and the civil service rules and regulations of said City of Portland, and that said defendants did wrongfully and unlawfully deprive the plaintiff of said employment for ten days during the month of February, and for twenty-four and one-half days during the month of March and for three days during the month of April immediately before the filing of this petition, and during all of said times the defendants did wrongfully and unlawfully employ Calkers and Metermen and Tappers who were junior in appointment and service to the said petitioner, J. W. Dryden, and further, that said defendants did violate said civil service laws, charter provisions and rules and regulations by em-

ploying laborers who had never been appointed or examined or classified in said Class K for skilled labor service and who nevertheless were so employed by the defendants to do the work that plaintiff was entitled to do, and during the period of their said wrongful and unlawful employment the plaintiff was thereby disemployed and held in idleness by the said defendants contrary to, and in violation of the said civil service charter provisions, laws, rules and regulations of the City of Portland and of the said civil service Board of Commissioners."

Aside from admitting that the plaintiff was appointed as a meterman and tapper from March 16, 1909, these quoted allegations of the writ are denied by the answer.

The plaintiff claims to have been deprived of employment for thirty-seven and one-half days to his damage in the sum of $134.37. This also was denied by the answer. The writ required the defendants immediately to restore the petitioner to his work within his classification as a calker and as a meterman and tapper, that the defendants continue to employ him thereafter according to his seniority when there was employment due to him and, lastly, that at the hearing of the writ they should pay him $134.37 in satisfaction of the damages alleged, or in the alternative show cause why they had not done so.

The new matter in the answer contains a history of the different changes in the civil service regulations of the city and in substance alleges that the employment which the plaintiff claims infringed upon his rights was regular by reason of the rule allowing the defendants to appoint men as foremen when there was no list prescribed by the civil service commission from which selections could be made.

It appeared in evidence and is admitted that prior to the hearing of the writ the plaintiff was re-employed in his classification and was then so in the employment of the city. It seems that during the pendency of the action the plaintiff filed a supplemental petition alleging further violations of his rights to his increased damage, but no amended writ was issued.

The court after a hearing made the writ peremptory but with this difference, that instead of compelling the defendants to pay the damages alleged they were commanded "that they and each of them forthwith comply with all of the provisions of the charter of the City of Portland, of the ordinances of the City of Portland, and with the rules and regulations of the Civil Service Board of the City of Portland, necessary on their part to be done to enable the plaintiff to obtain the said sum of $225.75 from the City of Portland, that being the total amount of the plaintiff's damage as asserted in the writ and the supplemental petition. The defendants appeal.

REVERSED AND WRIT DISMISSED.

For appellants there was a brief over the names of *Mr. Walter P. La Roche*, City Attorney, and *Mr. H. M. Tomlinson*, with an oral argument by *Mr. La Roche*.

For respondent there was a brief over the names of *Mr. W. S. U'Ren* and *Messrs. Sinnott & Adams*, with oral arguments by *Mr. U'Ren* and *Mr. R. B. Sinnott*.

BURNETT, J.—There is no cause of action stated against either Kaiser or Gray. It is charged that they were subordinates of Daly and there is nothing to show in any respect that they had any authority to employ or discharge the plaintiff or to exercise

any discretion or control in respect to him. As to them, the writ might as well have been issued to any other employee of the city.

1. It is a principle of pleading that the pleader should state facts rather than conclusions of law. Litigation may be likened to a syllogism wherein the major premise is the law of the land which need not be stated because it is already known to the court. An apparent exception to this statement is found in the rules about pleading a private statute or a town ordinance under Sections 89 and 90, L. O. L. It has also been held in apparent exception to this rule that the court will not take judicial notice of municipal enactments by the initiative process: *Birnie* v. *La Grande,* 78 Or. 531 (153 Pac. 415); *Chan Sing* v. *Astoria,* 79 Or. 411 (155 Pac. 378); *Rusk* v. *Montgomery,* 80 Or. 93 (156 Pac. 435); *Dennis* v. *Willamina,* 80 Or. 486 (157 Pac. 799).

The allegations of the pleader correspond to the minor premise and must consist of the facts upon which the pleader relies to lead to the desired conclusion of the syllogism which should be embodied in the judgment. It is quite insufficient to state conclusions of law in the pleading or minor premise: *State* v. *Chadwick,* 10 Or. 423; *Parker* v. *Thomson,* 21 Or. 523 (28 Pac. 502); *O'Hara* v. *Parker,* 27 Or. 156 (39 Pac. 1004); *Mellott* v. *Downing,* 39 Or. 218 (64 Pac. 393); *Zorn* v. *Livesley,* 44 Or. 501 (75 Pac. 1057); *State* v. *Malheur County Court,* 46 Or. 519 (81 Pac. 368); *Darr* v. *Guaranty Loan Association,* 47 Or. 88 (81 Pac. 565); *Van Buskirk* v. *Bond,* 52 Or. 234 (96 Pac. 1103); *Equitable Savings & Loan Assn.* v. *Hewitt,* 55 Or. 329 (106 Pac. 447); *Jackson* v. *Stearns,* 58 Or. 57 (113 Pac. 30, Ann. Cas. 1913A, 284, 37 L. R. A. (N. S.) 639); *Morton* v. *Wessinger,* 58 Or. 80 (113

Pac. 7); *Long* v. *Dufur*, 58 Or. 162 (113 Pac. 59); *Moore* v. *Fowler*, 58 Or. 292 (114 Pac. 472); *Proebstel* v. *Trout*, 60 Or. 145 (118 Pac. 551); *McDaniel* v. *Chiaramonte*, 61 Or. 403 (122 Pac. 33); *Splonskofsky* v. *Minto*, 62 Or. 560 (126 Pac. 15); *Scholl* v. *Belcher*, 63 Or. 310 (127 Pac. 968); *Shipman* v. *Portland Construction Co.*, 64 Or. 1 (128 Pac. 989); *Equi* v. *Olcott*, 66 Or. 213 (133 Pac. 775); *Purdin* v. *Hancock*, 67 Or. 164 (135 Pac. 515); *Barnard* v. *Houser*, 68 Or. 240 (137 Pac. 227); *Gibson* v. *Kay*, 68 Or. 589 (137 Pac. 864); *Templeton* v. *Cook*, 69 Or. 313 (138 Pac. 230); *Farrell* v. *Kirkwood*, 69 Or. 413 (139 Pac. 110).

2. The statement "that the position of calker and the position of meterman and tapper are positions within the definition of said Class K and that plaintiff and petitioner was duly examined, classified and appointed as required by the charter provisions and rules and regulations of the Civil Service Board of the City of Portland" is a mere conclusion of law. There is no magic in those names by which the court is informed judicially of the duties pertaining to such positions. The ultimate fact should be put into the pleading so that the court may be enabled to draw the conclusion that they are in the category referred to and the same principle applies to the classification and appointment mentioned.

3. The writ seems to indicate that different casts of employees have been established by the civil service regulations of the City of Portland. Wherein one differs from the others is not portrayed in the writ. If the calker is not allowed to handle a pick, shovel or spade, but, on the contrary, must use only a drill, wrench or hammer, it should be stated so that the court may know in which classification the plaintiff stands. It is not stated except in the form of a conclusion

that the other men were employed at work exclusively referable to the classification under which the plaintiff claims. For aught that appears, the other employees were put at labor entirely different from that for which the plaintiff was classified. Neither does it appear that the city had work at the time requiring the services of one skilled as the plaintiff claims he was. It is not pointed out what control the defendant Daly had of the plaintiff as an employee, neither is it indicated what step or process should be taken by Daly in order to pay the plaintiff if he was so employed; neither is it shown that there was any fund available for the payment of the plaintiff at the time of which he complains. The writ, which constitutes the only initiatory pleading on the part of the plaintiff under Sections 618, 619 and 620, L. O. L., must clearly indicate a present unperformed duty on the part of the defendant requisite for the preservation of the rights of the plaintiff. It is not aided by the petition either in the original or supplemental form: *State* v. *Williams,* 45 Or. 314 (77 Pac. 965, 67 L. R. A. 166); *State* v. *Malheur County Court,* 46 Or. 519 (81 Pac. 368).

4–6. Moreover, as it appears without controversy that prior to the hearing the plaintiff had been restored to employment, the court was not required to do the vain thing of issuing a peremptory writ for the accomplishment of something which had already been performed. This is within the principle of such cases as *State* v. *Webster,* 58 Or. 376 (114 Pac. 932), *State ex rel.* v. *Fields,* 53 Or. 453 (101 Pac. 218), and other like precedents. Even so late as when the cause reaches this court on appeal, such a state of facts may be made to appear by affidavit and the court will decline to proceed further. Conceding that the plain-

tiff was wrongfully deprived of his employment, he has ample remedy at law by an action against the city, under the authority of *Ransom* v. *City of Boston*, 192 Mass. 299 (78 N. E. 481, 7 Ann. Cas. 733). The plaintiff has cited this case in support of his present contention, but it is not parallel, for that was an action of contract brought against the city to recover wages which the plaintiff would have received if he had been employed continuously by the defendant within certain days mentioned. *Mandamus* is not to be used primarily for the collection of debts. The result is that the judgment of the Circuit Court is reversed and the writ dismissed.

REVERSED AND WRIT DISMISSED.

McBRIDE, C. J., and BEAN, J., concur.

HARRIS, J., concurs in the result of this opinion.

Argued June 7, modified June 25, 1918.

STABLER *v.* MELVIN.

(173 Pac. 896.)

Fraud—Injury from Fraud.

1. Although defendant, an attorney, induced plaintiff, his client, to execute to him without consideration a note and mortgage on her land, which note and mortgage he sold, retaining the proceeds, plaintiff could not recover the amount of the note; the land having been purchased by one who agreed to pay, as part consideration therefor, the note and mortgage, and who had in fact acquired the note and mortgage, and plaintiff not having paid the note, and no demand therefor having been made on her, plaintiff might have a valid defense to any suit thereon.

Fraud—Evidence—Sufficiency.

2. Evidence *held* to show that note and mortgage in hands of *bona fide* purchaser were secured by defendant through fraud upon plaintiff, who was then his client, so as to warrant judgment for plaintiff against him for the amount of the note and mortgage.

[As to what is sufficient proof in actions for fraud, see note in 65 Am. Dec. 157.]

Costs—Discretion of Court.

3. Under Article VII, Section 3, of the Constitution, as amended in 1911 (see Laws 1911, p. 7), authorizing modification of judgment on appeal, the court on appeal has the power to award costs on equitable principles, and to give or deny costs to either party on appeal.

From Multnomah: HENRY E. MCGINN, Judge.

Department 2.

The plaintiff is a widow 65 years of age, without any experience in business affairs. The defendant is an attorney duly licensed to practice in this state, with offices in the City of Portland, and in connection therewith is a real estate broker. On November 12, 1912, plaintiff was the owner of two lots in Block 17 of Westmoreland Addition to the City of Portland, with mortgages thereon amounting to about $2,750, and some city liens.

As her agent the defendant undertook to negotiate a trade for the plaintiff by which she would receive property free of any lien in exchange for her encumbered lots. As a result of the defendant's negotiations the plaintiff executed a deed of her lots to Bruce Wolverton and in exchange received from him a deed to a forty-acre tract of land in the State of Washington.

The defendant represented to the plaintiff that in order to consummate the deal it was necessary for him to convey two certain lots in the Santiam Hunting and Fishing Club grounds which he claimed to own and to be of the reasonable value of $500, claiming also that the plaintiff was justly indebted to him in the sum of $250 for alleged legal services.

Concurrent with the execution of the deed to her and relying on such representations, the plaintiff executed to the defendant her promissory note for $750, payable two years after date, with interest at the

rate of 7 per cent per annum, and to secure the payment thereof gave the defendant a mortgage on the forty-acre tract which was conveyed to her by Wolverton.

Before maturity and for value the defendant sold and assigned the note and mortgage to the Merchants' Savings and Trust Company, and the mortgage is now a valid lien on the land. The defendant appropriated to his own use and benefit the proceeds from the sale of the note.

It is alleged that the representations of the defendant were false and fraudulent and that they were made with intent to deceive and mislead the plaintiff; that, relying thereon, she was misled and deceived and that by reason thereof she was induced to and did execute the note and mortgage.

Plaintiff contends that the two lots in the Hunting and Fishing Club grounds were fictitious and their alleged value was no part of the consideration for the exchange of property; that defendant's claim of $250 against the plaintiff was not a valid or just claim, and that he had been paid in full for all services which he had ever rendered to the plaintiff.

In November, 1913, as the owner thereof, defendant conveyed to the plaintiff another fifteen-acre tract in the State of Washington and concurrent therewith induced her to execute to him a note for $650, payable three years after date, with interest at 8 per cent per annum, and to give a mortgage on the land to secure payment of that note. The deed from the defendant to the plaintiff and the note and mortgage from the plaintiff to the defendant were without consideration.

Before maturity and for value the defendant sold and assigned the note and mortgage and retained the proceeds from the sale. It appears from the record

that Hattie C. Burton is now the owner and holder of the note and mortgage and that by mesne conveyances she became and is now the owner and holder of the fifteen-acre tract. The record shows and Mrs. Burton testifies that she bought the fifteen-acre tract subject to the $650 mortgage which was a part of the consideration and that she "assumed and agreed to pay it." In his answer the defendant admits that he was in the employ of the plaintiff as her attorney and that he received and retained all of the proceeds from each of the notes, and affirmatively alleges that he did this by virtue of a settlement and an agreement with the plaintiff, asserting that he had a legal right to do so.

The jury returned a verdict against the defendant for $1,411.69, which must have included the amount of the two notes. Judgment was entered upon the verdict, from which the defendant appeals.

MODIFIED.

For appellant there was a brief and an oral argument by *Mr. W. Y. Masters.*

For respondent there was a brief over the names of *Mr. Albert H. Tanner, Mr. Milton R. Klepper* and *Mr. John Van Zante,* with oral arguments by *Mr. Tanner* and *Mr. Klepper.*

JOHNS, J.—1. The complaint is voluminous, yet in substance it is an action for money had and received. There are eleven assignments of error, but under the conclusion which we have reached after a careful study of the whole record they all become immaterial and unimportant, except as to the amount of the judgment. It appears from the record that the $650 note and mortgage upon the fifteen-acre tract were exe-

cuted without any consideration; that in truth and in fact the defendant was the owner of the land at the time that note and mortgage were executed; that Hattie C. Burton is now the owner of that land and of the note and mortgage, and that when she acquired the title and as one of the considerations she assumed the mortgage and agreed to pay the note. Plaintiff has not paid the note, no demand has ever been made upon her for payment and she might have a valid defense to any suit or action against her to enforce payment of that note. Under such a state of facts we do not know of any principle of law, and counsel have not cited any authority, by which the plaintiff could now recover a judgment against the defendant for the amount of the $650 note, yet it is very apparent that such sum is included in and is a part of the judgment against the defendant for $1,411.69. To that extent the judgment is wrong.

The $750 note was executed by the plaintiff to the defendant and secured by a mortgage upon the forty-acre tract then owned and held by the plaintiff, and the defendant sold and assigned the note and mortgage before maturity and appropriated the proceeds to his own use. The mortgage was upon her own land and as the maker the plaintiff is now liable on that note and mortgage according to the terms thereof.

2. The testimony is convincing and the jury must have found that there was no consideration for the $750 note and mortgage and that the plaintiff was deceived and misled into the execution thereof by the false and fraudulent representations of the defendant as to the terms and conditions by which she acquired title to the forty-acre tract. This conclusively appears from the testimony of Bruce Wolverton, with whom the defendant made the deal and who testifies

positively that the only consideration which he ever received for the conveyance of the forty-acre tract to the plaintiff was her deed to the two lots in Westmoreland. Defendant was called as a witness in his own behalf and did not attempt to explain or contradict the testimony of Wolverton. He also admitted that he sold and disposed of the $750 note and mortgage and retained the proceeds. We are of the opinion that there was no consideration for the $750 note and mortgage and that in equity and in good conscience that note and that mortgage when executed were the property of the plaintiff; that the defendant should account to the plaintiff for the amount thereof, and that by reason thereof the defendant is justly indebted to the plaintiff in the sum of $750, with interest thereon from February 14, 1916, the date of the judgment in the lower court, at the rate of 6 per cent per annum.

This is an equitable action. The plaintiff is a widow 65 years of age and it clearly appears that she is wholly inexperienced in business affairs; that the defendant took an unfair advantage of her situation and the relations existing between them; that on November 12, 1912, through fraud and deceit he wrongfully and without any consideration obtained the $750 note and mortgage, and that in November, 1913, he sold and assigned them, appropriating the proceeds to his own use and benefit. Plaintiff's judgment was entered February 14, 1916.

3. Among other things, Section 3 of Article VII of the Constitution as amended in 1911, in speaking of actions at law, provides:

"If the Supreme Court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment

shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the Supreme Court."

The judgment appealed from should be changed. There is no dispute as to any of the material facts in this case and under such facts we feel that it would be a gross injustice to allow appellant costs on this appeal. It is our opinion that the power given to this court, under this section, to enter a judgment upon the record carries with it the power to award costs on equitable principles, and to give or to deny costs to either party on appeal. The judgment of the lower court is modified and it is ordered and adjudged by this court that the plaintiff and respondent have judgment against the defendant and appellant and his sureties on appeal for the sum of $750 with interest thereon from February 14, 1916, at the rate of 6 per cent per annum, and her costs in the lower court; and that neither party have or recover costs in this court.

MODIFIED. JUDGMENT RENDERED.

McBRIDE, C. J., and MOORE and BEAN, JJ., concur.

Argued at Pendleton May 8, reversed and remanded June 4, rehearing denied July 2, 1918.

WADE *v.* PETERS.

(173 Pac. 567.)

Judgment—Former Adjudication—Decision on Demurrer.

1. Where a complaint contains all essential allegations to the cause of action, but a demurrer is sustained thereto and a judgment of dismissal rendered, such judgment bars a subsequent suit for the same cause of action, wherein the complaint contains no substantial averment which is not found in the former complaint.

[As to elements necessary to conclusiveness of judgment in another action, see note in 8 **Am. St. Rep.** 229.]

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc.

This is an action by a real estate broker to recover his commissions alleged to have been earned in finding a purchaser for certain lands of defendant. The complaint alleges a written contract between the parties, which is set out in full, as follows:

"Pendleton, Oregon, May 10, 1917.

"E. T. Wade:

"Until July 10, 1917, you are hereby authorized to act as my sole agent to sell my land. The NW. ¼ and the South half of Section 31, and the Southwest ¼ of Section 32, Tp. 3 N. Range 31 E. W. M., Umatilla County, Oregon, for the sum of $45.00 per acre, and in case of a sale, you are to receive 5 per cent as commission for selling same. It is understood that the 1–3 of the crop goes with the land at above price.

"H. PETERS, Owner."

This is followed by these allegations:

"That thereafter and prior to the 10th day of July, 1917, to wit, upon the 27th day of June, 1917, this plaintiff duly accepted the appointment as such agent

and accepted the offer so made by the said H. Peters in writing, and so notified the said H. Peters thereof by letter as follows:

" 'Pendleton, Oregon, June 27, 1917.

" 'Mr. Herman Peters,

" 'Pendleton, Oregon.

" 'Dear Sir:

" 'I have this day sold the land described as the Northwest quarter and the South half of Section 31 and the Southwest quarter of Section 32, Township 3 North, Range 31 East W. M., acting as your agent, to Mr. William Mills, of Pendleton, Oregon, at a price of $45.00 per acre, including one-third of the crop to go with the land. Mr. Mills is willing to take the land subject to the rights of the present lessees in the summer fallow, and if there is a mortgage against the property, he is willing to take the land subject to the mortgage, providing the amount of the mortgage and interest to date of transfer is deducted from the purchase price of $45.00 per acre. Kindly arrange to furnish abstract and make deed within the next day or two, as Mr. Mills is anxious to get the transaction closed. Yours truly,

" 'E. T. WADE.'

"And thereafter, and on the 28th day of June, 1917, the said defendant further ratified said offer and ratified and confirmed the acts of this plaintiff as his agent in selling and disposing of said lands, and so notified the plaintiff in writing by letter as follows:

" 'Pendleton, Oregon, June 28, 1917.

" 'E. T. Wade,

" 'Pendleton,

" 'Oregon.

" 'Dear Sir:

" 'Mr. Herman Peters and wife executed a deed to William Mills for the Northwest quarter and the South half of Sec. 32, all in the Township 3 North, Range 31 East W. M., in Umatilla County, Oregon. Mr. Herman Peters left the deed to Mr. William Mills upon the payment of the money. Please advise Mr.

Mills and have him call and get the deed at his earliest convenience.

"'Respectfully yours,

"'J. B. PERRY.'

"In duplicate.

"That this plaintiff did prior to the 6th day of July, 1917, sell the said lands to one William Mills, at the agreed price of $45.00 per acre. That the said defendant has heretofore in pursuance of such sale, executed and delivered a deed to the said William Mills, and has received the purchase price therefor, and the entire sale and transaction has been completed, and the defendant has fully accepted same, and has received the benefit of the services of this plaintiff in the sale of said lands, and has received the benefit of the moneys expended by this plaintiff in effecting such sale of said lands and the defendant H. Peters is indebted to this plaintiff in the sum of $1487.58 as commission upon said sale, but the defendant has refused, neglected, and failed to pay same."

The answer, after some admissions and denials pleaded two affirmative defenses, of which the second only is material to the present discussion. This portion of the answer pleads a former adjudication of the same issues, setting out the complaint, which, because of the questions involved, is here set out in full.

"That on prior to, and subsequent to the 10th day of May, 1917, the defendant, H. Peters, was the owner of the Northwest quarter, and the South half of Section 31, and the Southwest quarter of Section 32 in Township 3 North, Range 31 East of the Willamette Meridian in Umatilla County, and State of Oregon.

"That on the 10th day of May, 1917, and while the defendant was so the owner of said lands, the defendant in writing employed the plaintiff to act as his sole agent to sell the said tract of land at the agreed price of $45.00 per acre, and therein agreed that in case of sale of said lands on or before July 10, 1917, he would pay to the plaintiff the sum of five (5) per cent as commission for selling said lands.

"That the writing and authority under and by which the defendant so authorized this plaintiff to sell said lands and so agreed to pay such commission therefor, was in words and figures as follows, to wit:

" 'Pendleton, Oregon, May 10, 1917.

" 'E. T. Wade:

" 'Until July the 10th, 1917, you are hereby authorized to act as my sole agent to sell my land. The NW. ¼ and the South half of Sec. 31 and the Southwest ¼ of Section 32, Tp. 3 N. Range 31 E. W. M. in Umatilla County, Oregon, for the sum of $45.00 per acre, and in case of a sale, you are to receive 5 per cent commission for selling same. It is understood that the 1–3 of the crop goes with the land at above price.

" 'H. PETERS, Owner.'

"That in pursuance of such authority, and relying upon the promises and agreements of the defendant, that the defendant would pay to the plaintiff the commission aforesaid in the event the plaintiff sold the aforesaid lands before July 10, 1917, this plaintiff did with the full knowledge and approval of defendant, devote many days' time and incurred financial expenses in an endeavor to sell the said lands for the defendant; and did advertise the same for sale at his own cost and expense, and in so advertising and endeavoring to sell said lands did spend a sum of money, to wit: the sum of $50.00, and this plaintiff did prior to the 6th day of July, 1917, sell the said lands to one William Mills, at the agreed price of $45.00 per acre. That the said defendant has heretofore, and in pursuance of such sale, executed and delivered a deed to the said William Mills, and has received the purchase price therefor, and the entire sale and transaction has been completed, and the defendant has fully accepted same and has received the benefit of the services of this plaintiff in the sale of said lands, and has received the benefit of the moneys expended by this plaintiff in effecting such sale of said lands, and the defendant H. Peters is indebted to this plaintiff in the sum of $1487.58 as commission upon said sale, but

the defendant has refused, neglected and failed to pay the same."

The answer then sets out the demurrer and the ruling of the trial court, sustaining it, and the judgment dismissing the action.

A reply having been filed, there was a trial resulting in a verdict and judgment for plaintiff, from which defendant appeals. REVERSED WITH DIRECTIONS.

For appellant there was a brief with oral arguments by *Mr. C. M. White* and *Mr. Stephen A. Lowell.*

For respondent there was a brief over the name of *Messrs. Raley & Raley,* with an oral argument by *Mr. James H. Raley.*

BENSON, J.—1. The conclusion which we have reached renders it unnecessary to discuss any of the assignments of error except the ruling of the trial court in sustaining a demurrer to the defense of *res judicata.* At the outset, it is observed that the complaint in the first action, when tested by the law as enunciated in the case of *Oregon Home Builders* v. *Crowley,* 87 Or. 517 (170 Pac. 718, 171 Pac. 214), is a perfectly good complaint, and every feature which distinguishes that case from *Lueddemann* v. *Rudolf,* 79 Or. 249 (154 Pac. 116, 155 Pac. 172), is present in the instant case. The additional allegations in the complaint in the present action do not add anything to the vitality of the corresponding pleading in the former, wherein the authorization is set out, followed by allegations of complete performance by the plaintiff of the things to be done by him thereunder. Under these circumstances it remains to consider whether the judgment upon demurrer in the prior case is a bar

to the present action. In *Hume* v. *Woodruff,* 26 Or. 373 (38 Pac. 191), the general rule is approved, holding that

"a decree sustaining a demurrer to a complaint and dismissing the suit because it does not state facts sufficient to constitute a cause of suit, is, until reversed, a final determination of the issues presented by such complaint, and can be pleaded as a bar to a subsequent action for the same cause."

In the case of *O'Hara* v. *Parker,* 27 Or. 156 (39 Pac. 1004), this doctrine is again asserted, but announcing the modification of the rule to the effect that where an essential allegation is wanting in a complaint to which a demurrer is sustained, a decree of dismissal is not a bar to a subsequent suit between the same parties, concerning the same subject matter, if the missing essential averment is supplied in the second pleading. A very able discussion of the question involved herein, applying the principles which distinguish and harmonize the two cases above cited, is to be found in *Spicer* v. *United States,* 5 Court of Claims Rep. 34. In this case plaintiff brought an action for breach of contract in refusing to inspect and receive certain horses. A demurrer was sustained to the complaint, for the reason that it contained no allegation that the claimant had ever delivered or offered to deliver any portion of the horses which he had contracted to furnish. The action having been dismissed, claimant began a second action for the same cause, in which there was the added averment in the petition, "that he was ready and willing and offered to comply with his said contract, and deliver the horses, etc." The defendants pleaded the former action in bar, and in the course of an able and exhaustive

opinion, wherein it is held that the plea is not well taken, the court says:

"After a somewhat extended review of this branch of the law, I am inclined to think that no case can be found, and certainly none in the federal courts, where a judgment rendered on demurrer, alleging the want of a material fact in the declaration, has been deemed a bar to a second action presented by a declaration wherein the material fact omitted from the first is sufficiently averred. The concurrent ruling of both the American and English courts seems to be that a judgment rendered for the want of a specific fact in the declaration is not a judgment upon the merits."

This concise statement of the law is clear, and accurate, and is confirmed by our own investigation of the authorities. It is of no avail to the plaintiff in the present action however, since a careful examination of the complaint in the prior action discloses that no essential allegation is omitted therefrom, and the later pleading contains no substantial averment which is not found in the former. This being true, it follows that plaintiff's only effective recourse in the first action was to have appealed from the judgment upon the demurrer, and having failed to do so, he is barred from prosecuting the present proceeding. *Gould* v. *Evansville etc. R. R. Co.*, 91 U. S. 526. The judgment must be reversed and the cause remanded with directions to enter judgment for the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

Argued February 26, affirmed March 12, rehearing denied July 2, 1918.

CARRIKER *v.* LAKE COUNTY.*

(171 Pac. 407; 173 Pac. 573.)

Statutes—Local Laws—Initiative—Powers of People of County.

1. Article IV, Section 1a, of the Constitution, providing that the initiative and referendum powers reserved to the people by the Constitution are further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation of every character in and for their respective municipalites and districts, does not confer on the voters of a county power to adopt a law, authorizing the County Court to levy taxes for the payment of bounties on jackrabbits, in the absence of any enabling act passed by the legislature, or by the people of the whole state granting such power to the people of a county.

[As to construction of initiative or referendum provision in Constitution, statute or municipal charter, see note in **Ann. Cas. 1916B, 819.**]

ON PETITION FOR REHEARING.

Constitutional Law—Self-executing Provisions—Initiative and Referendum—Power of People of County.

2. In the absence of an enabling act, the people of a county, as distinguished from the people of a city or town, cannot initiate and enact a local law; Article IV, Section 1, of the Constitution, providing that the initiative and referendum powers reserved to the people are further reserved to the voters of every municipality and district, as to local, special and municipal legislation therefor, not being self-executing, as is Article IV, Section 1, making the reservation to the people of the State, and being required to be construed with Article XI, Section 2, giving power to cities and towns, as distinguished from other municipalities, to make and amend their charters.

From Lake: L. F. CONN, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

This suit involves the question of whether the voters of Lake County can, in the exercise of the initiative and without an enabling act, enact a law authorizing the County Court to levy taxes for the payment of bounties on jackrabbits. A petition was signed by

*The constitutionality of initiative and referendum principle of government is discussed in notes in **11 L. R. A. (N. S.) 1192; 33 L. R. A. (N. S.) 969.** REPORTER.

more than 15 per cent of the legal voters residing in Lake County and filed with the Secretary of State on July 7, 1916, asking that a proposed measure providing for the levying of taxes for the payment of bounties on jackrabbits killed in Lake County, be submitted to the voters of that county at the regular biennial election to be held on November 7, 1916. The title and first two sections of the measure read as follows:

"An act to authorize, empower and direct the county court of Lake County, Oregon, to provide for the payment of a bounty for the killing of jackrabbits in Lake County, Oregon, by the residents of said county; to levy a sufficient tax for the payment of such bounty and directing the payment of the same from the general fund of the county if such levy be not made; and to prescribe regulations for the manner of making the necessary proof of the number of rabbits killed and the rules under which such bounty shall be paid.

"Be it enacted by the people of the county of Lake, State of Oregon:

"Section 1. That the county court of Lake County, Oregon, be, and it is hereby authorized, empowered and directed to order paid from the general fund of said county, or from a special fund created for that purpose by the said county court, the sum of five cents for each jackrabbit that may be killed within the boundaries of Lake County, Oregon, by residents of said county, from and after the taking effect of this act.

"Section 2. It shall be the duty of said county court, at the regular term thereof for the purpose of levying taxes, to compute the estimated expenditure for the purpose of this act for the ensuing year, and to make a sufficient levy, either as a general county tax or a special 'Rabbit Bounty Tax,' to cover such estimate, provided, that should the amount so levied in any one year be insufficient to pay the earned bounty for that year, or should the said county court fail, neglect or refuse to make such levy, the bounty provided for in this act shall be paid from the general fund of the said county": See Chapter 4, Laws 1917.

The remaining sections relate to the manner of making proof of claims, and to the payment of bounties. The measure was submitted to the voters of Lake County pursuant to the petition. There were 1,049 votes for and 589 against the measure. On December 9, 1916, the County Court made a tax levy to meet the county expenses estimated for the ensuing year, including a tax "for jackrabbit bounty fund—four and eight-tenths mills." If all the taxes had been paid the levy made by the County Court would have produced the following amounts:

"For jackrabbit bounty.....$45,217.27;
For general school purposes..... 32,028.90;
For general road purposes..... 27,803.31;
For all county purposes including payment of Lake County's portion of State Tax .....79,130.22."

The county assessor extended the total levy, on the assessment-rolls, against all the taxable property in Lake County and the sheriff proceeded to attempt to collect all the taxes levied by the County Court, including the tax levied for the purpose of paying bounties on jackrabbits. The plaintiffs, who are taxpayers residing in Lake County, paid all their taxes except the rabbit bounty tax, and then brought this suit to enjoin the collection of the rabbit bounty tax. The trial court overruled a demurrer to the complaint. The defendants declined to plead further and a decree was entered canceling the jackrabbit bounty tax, and enjoining the county officers from collecting it. The defendants appealed. AFFIRMED.

For appellants there was a brief over the names of *Mr. T. S. McKinney,* District Attorney, *Mr. William S.*

U'Ren and *Mr. Arthur D. Hay,* with oral arguments by *Mr. McKinney* and *Mr. U'Ren.*

For respondents there was a brief with an oral argument by *Mr. W. Lair Thompson.*

HARRIS, J.—1. Article IX, Section 3, of the state Constitution provides that "no tax shall be levied except in pursuance of law." Unless the jackrabbit bounty tax was levied "in pursuance of law" it would contravene the Constitution and therefore would be invalid. There is no law authorizing the levy of the tax in question unless it can be said that the measure voted upon by the people of Lake County became a law when a majority of the voters by their ballots registered their approval of the measure on election day. The validity of the the measure depends upon whether the voters had power to enact it into a law for Lake County. No act has ever been passed by the legislature or by the people of the whole state granting unto the voters of a county the right to enact a jackrabbit bounty law for themselves. It is argued by the defendants that Article IV, Section 1a, of the state Constitution of itself, without the aid of an enabling act passed by the legislature or by the people of the whole state in the exercise of the initiative, grants to the people of a county the power to pass a law for their county. The instant case is controlled by *Rose* v. *Port of Portland,* 82 Or. 541, 556, 557 (162 Pac. 498), where we held that

"both sections (Art. IV, Section 1a, and Art. II, Section 2, of the state Constitution) recognize the necessity of a charter as the measure of the legislative power to be exercised by corporations and both sections contemplate that no local subdivision of government except cities and towns can appropriate legislative power unto itself"; and that "no subdivision of gov-

ernment like a port or district can exercise power unless that power is first granted by some lawmakers authorized to legislate that power to the municipality or district."

Although the municipality in *Rose* v. *Port of Portland* was a port and the municipality in the instant case is a county, nevertheless the legal principle involved is identical in both cases. The opinion in *Rose* v. *Port of Portland* was the unanimous opinion of this court and represented the careful and deliberate judgment of all its members; and therefore for the reasons stated in that opinion and on the authority of that precedent and of *Barber* v. *Johnson,* 86 Or. 390 (167 Pac. 800), we hold that the voters of Lake County were without power to authorize the tax and that the jackrabbit bounty measure is void. The demurrer to the complaint was properly overruled and the decree is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE MOORE concur.

Former opinion adhered to and rehearing denied July 2, 1918.

ON PETITION FOR REHEARING.

(173 Pac. 573.)

Department 1.

On petition for rehearing. Former opinion adhered to. REHEARING DENIED.

Mr. T. S. McKinney, District Attorney, *Mr. William S. U'Ren* and *Mr. Arthur D. Hay,* for the petition.

Mr. W. Lair Thompson, contra.

HARRIS, J.—2. The defendants base their petition for a rehearing upon the contention that Article IV, Section 1a, of the State Constitution "is the grant of local legislative power and is itself the charter for all municipalities and districts." The contention that the Constitution is itself the charter for all municipalities and districts necessarily proceeds upon the assumption that the entire power to enact local, special and municipal legislation is, by force of Article IV, Section 1a, and Article XI, Section 2, subtracted from the whole sum of legislative power and set at large so that all municipalities and districts may whenever they choose and without further aid exercise some or all of such subtracted power. This contention is discussed at length by what is said in *Rose* v. *Port of Portland,* 82 Or. 541 (162 Pac. 498), and any further discussion of the question would only be a reiteration of what we have already said upon the subject. If Article IV, Section 1a, stood alone and by itself it might be construed to mean that every municipality and district could enact any local, special and municipal legislation; but this section of the Constitution does not stand alone. Article XI, Section 2, was submitted and adopted contemporaneously with the submission and adoption of Article IV, Section 1a. Each is a companion of the other. In obedience to a rule of construction recognized and applied everywhere this court has at all times and without a single dissenting voice read and construed these two sections of the Constitution together: *State* v. *Port of Astoria,* 79 Or. 1, 10 (154 Pac. 399); and when they are construed together the inevitable conclusion is that every municipality must have a charter and since cities and towns are the only municipalities which are granted the power to make their own charters it follows that a

county cannot make its own charter. A county cannot enact a law unless the power to enact that law is referable to a grant of power made by the people of the whole state or by their representatives, the legislature. Nor does it necessarily follow that a county can initiate and enact a local, special and municipal law without a charter merely because it can exercise the referendum without a charter granting it the power of exercising the referendum. As pointed out in *Rose* v. *Port of Portland,* 82 Or. 541, 553–558, 570 (162 Pac. 498), the words found in the two sections of the Constitution, when read together, define the extent of the power of the referendum and define and limit the power of the initiative.

Article IV, Section 1, of the Constitution reserves to the people of the whole state the power to enact and refer measures. The people of the state at large can initiate and enact laws without any other charter than the Constitution itself. Article IV, Section 1, is self-executing and therefore an enabling act is not necessary: *Stevens* v. *Benson,* 50 Or. 269 (91 Pac. 577); *Palmer* v. *Benson,* 50 Or. 277 (91 Pac. 579); *State* v. *Langworthy,* 55 Or. 303, 309 (104 Pac. 424, 106 Pac. 336). Our attention has been directed to the following sentence found in Article IV, Section 1a:

"The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts."

The suggestion is made that the language quoted from Section 1a reserves to the people of a county the power to exercise the initiative and referendum as to local, special and municipal legislation to the same extent as those powers are reserved to the people of

the entire state as to state-wide legislation. In other words, the suggestion made by defendants involves the idea that there are no more limitations upon the people of a county as to local, special and municipal legislation than there are upon the people of the whole state as to state-wide legislation and that therefore since no charter is needed by the people of the whole state no charter is needed by the people of a county. As stated in *Rose* v. *Port of Portland,* 82 Or. 541, 552 (162 Pac. 498):

"In the beginning, the whole sum of legislative power came from all the people and when they reclaimed the right to legislate they only returned to themselves what they had previously delegated to their representatives and hence no charter is needed to measure the right of the people to legislate, for it is a right which is unfettered except as the people themselves have limited it."

The power of the people of the state at large is measured by Article IV, Section 1; but the power of the people of a county is measured by Article IV, Section 1a, and Article XI, Section 2, and these two sections when read together require a charter. Moreover, Article IV, Section 1, is self-executing, but Article IV, Section 1a, is not self-executing as to counties: *Schubel* v. *Olcott,* 60 Or. 503, 508 (120 Pac. 375); *State* v. *Port of Astoria,* 79 Or. 1, 13 (154 Pac. 399). The construction which this court unanimously placed upon Article IV, Section 1a, and Article XI, Section 2, in *Rose* v. *Port of Portland,* 82 Or. 541 (162 Pac. 498), is the only construction that can harmonize the two sections and at the same time give effect to the language of both sections. The petition for a rehearing is denied. AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., BURNETT and MOORE, JJ., concur.

Argued June 19, reversed and remanded July 2, 1918.

MOUMAL *v.* PARKHURST.

(173 Pac. 669.)

Landlord and Tenant—Remedies of Tenant—Pleading Recovery of Deposit—"Evicted."

1. Where a lessee had deposited $10,000 with lessor for the payment of taxes and the rent for the final months of the term and to be forfeited in case of nonpayment of rent, a complaint, in a suit by lessee to recover the deposit on the ground of eviction, stated a good cause of action as against demurrer on the ground that the deposit was a payment for a particular purpose and that there was no provision in the lease for its repayment; the word "evicted" meaning to be deprived of possession of lands or tenements, so as to terminate the tenancy.

[As to what may amount to eviction, see note in 17 **Am. Rep.** 62.]

Landlord and Tenant—Leases—Construction—"Deposit"—"Payment."

2. Under a lease whereby the lessee deposited $10,000 with the lessor to be held by the lessor and applied in payment on the rent for the final months of the tenure and for taxes, such amount to be the property of the lessor if the lease be forfeited or annulled on account of nonpayment of rent or otherwise, lessor to pay 6 per cent per annum until the deposit was taken over, the amount constituted a deposit the title to which remained in the lessee subject to the conditions of the lease and did not constitute an actual payment to the lessor at the time of the execution of the lease; "payment" meaning a transfer of money from one person who is the payer to another who is the payee, in satisfaction of a debt, and a "deposit" being made when one person gives to another, with his consent, the possession of personal property to keep for the use and benefit of the first or a third party.

Damages—Deposits to Secure Lease—"Penalty."

3. Where lease provided for the deposit of $10,000 by the lessee with the lessor to be forfeited in case of nonpayment of rent or other fault of the lessee, such deposit constituted a "penalty" and not liquidated damages.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 1.

On May 13, 1913, the defendants were, and now are, the owners of Lots 1 and 4 in Block 18 of Couch's Addition to the City of Portland and then executed a lease thereof, with a building to be erected thereon,

to the plaintiff and P. J. Maher for the term of ten years; for which they received $10,000 under the terms and conditions of the lease, a copy of which is made a part of the complaint and in which it is provided:

"The said lessees do further by these presents hereby deposit and turn over to the lessor the sum of Ten Thousand Dollars ($10,000), the receipt of which is hereby acknowledged, which said Ten Thousand Dollars ($10,000) is to be held by said lessor and applied in payment of the rent for the final months under this lease, and taxes for the year 1922; and in case this lease is for any reason forfeited or declared null and void on account of any fault of the said lessees for the nonpayment of rent or otherwise, then said Ten Thousand Dollars ($10,000) shall be and become the property of said lessor. During the life of this lease, however, the said lessor shall pay to the said lessees interest on said deposit, until the said sum is taken over by the said lessor in payment of rent or by forfeiture, annually, at the rate of six per cent (6%) per annum.

"Provided, always, and this lease is upon the express condition (anything hereinbefore contained to the contrary notwithstanding), that if the rent herein reserved is not paid on the date herein required, said date being hereby agreed to be the date of the signing and execution of this lease, and on a like date each and every month thereafter, or if any other of the covenants or agreements of said lessees herein contained are broken or failed or neglected to be done or kept or performed by them, then and in either of said cases, said lessor may, at his option, immediately or at any time thereafter, and without further notice or demand, enter into and upon said leased premises, or any part thereof in the name of the whole, and repossess the same as of his former estate, and expel said lessees and those claiming under them, and remove their effects, forcibly if necessary, without being taken or deemed guilty in any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant."

It is alleged that thereafter the building was erected and the lessees took possession of the premises, paying the rent to the defendants until about September 13, 1915. On December 14, 1914, Maher set over and assigned any and all of his right, title and interest in the lease and the $10,000 to this plaintiff, who paid the defendants all accruing rents up to September 13, 1915, except the sum of $1,400. It is further alleged that about that date the defendants evicted the plaintiff from the premises and thereby terminated the lease and plaintiff's tenancy; that since that time defendants have been in possession of the premises and the building constructed thereon and have been collecting and receiving the rents from the tenants thereof; that by reason of such eviction the plaintiff is entitled to a return of the $10,000 with interest, less the amount due the defendants for rent at the time of the eviction, and plaintiff prays for a judgment against the defendants for the sum of $8,600 and interest. The defendants filed the following demurrer to the complaint:

"Come now the defendants and demur to the second amended complaint of the plaintiff, for the reason and upon the grounds that said second amended complaint does not state facts sufficient to constitute a cause of action, in this, that it appears upon the face of said second amended complaint that the full sum of money, to wit: $10,000, which is alleged by the plaintiff to have been paid to the defendant Alfred L. Parkhurst was so paid for a particular and specific purpose, to wit: for the payment of the rent for the final months under the lease, and taxes for the year 1922, as set out in the lease which is made a part of and described in plaintiff's second amended complaint, and that there is no provision therein for its return to plaintiff whatsoever."

On October 17, 1916, the lower court sustained the demurrer, the plaintiff refused further to plead and

on February 5, 1917, the court entered judgment in favor of the defendants, from which plaintiff appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Messrs. Chamberlain, Thomas, Kraemer & Humphreys* and *Mr. R. K. Powell,* with an oral argument by *Mr. Otto J. Kraemer.*

For respondents there was a brief over the names of *Mr. L. E. Crouch* and *Mr. S. C. Spencer,* with an oral argument by *Mr. Crouch.*

JOHNS, J.—1. For the purposes of this opinion all of the material allegations of the complaint are deemed to be true and the question presented is whether, under the terms and provisions of the lease, the $10,000 was a deposit or an actual payment, and whether the money is to be treated as a penalty or as liquidated damages. There is no provision in the lease for a reletting of the premises by the landlord on account of the tenant for nonpayment of rent or the breach of any covenant. It is alleged that the defendants evicted plaintiff from the premises and thereby terminated the lease and plaintiff's tenancy; that defendants have been in possession ever since and have collected the rents. When used in a pleading, the word "evicted" has a legal meaning. In an early English case the party evicted was said to be "expelled, amoved and put out." Bouvier defines eviction as "deprivation of the possession of lands or tenements" and says:

"It may be fairly stated that any actual entry and dispossession, adversely and lawfully made under paramount title, will be an eviction."

In McAdam on Landlord and Tenant (4 ed.), Volume 2, page 1375, it is said:

"The term 'eviction,' in its primary sense, means a dispossession by legal proceeding or judicial sentence; the recovery of lands and tenements from another's possession by due course of law. The word is now used to denote any act of the landlord by which his tenant is deprived of the enjoyment of the whole or of a part of the demised premises. * *

"An 'eviction' has been defined as 'any act of permanent character done by the landlord or by his procurement with the intention and effect of depriving the tenant of the enjoyment of the premises demised, or part thereof.' "

The demurrer admits that the defendants evicted plaintiff and that they are now in possession and collecting the rents, and in the absence of a provision in the lease for a reletting of the premises by the landlord for and on account of the tenant, it must be assumed that the landlord did not make his re-entry for the purpose of reletting the property and marshaling the rents for and on account of the tenant, and that such re-entry did terminate the lease. Assuming that the lease was terminated, it is the defendants' contention that the $10,000 was an actual payment by plaintiff to defendants at the time the lease was executed and that through a failure of the plaintiff to pay rental as provided for in the lease they are now entitled to keep and retain the money as a penalty under the terms and provisions of the lease. In *Cranston* v. *West Coast Life Ins. Co.*, 63 Or. 427, 437 (128 Pac. 427), it is said that as usually construed "payment" means "a transfer of money from one person who is the payer to another who is the payee in satisfaction of a debt." To constitute payment, therefore money or some other valuable thing must be delivered by the debtor to the creditor for the purpose of extinguishing the debt and the debtor must receive it for the same purpose. Payment is defined to be "the act of paying or that which

is paid to discharge the obligation or duty; satisfaction of a claim or recompense; the fulfillment of a promise or the performance of an agreement; the discharge in money of a sum due."

The lease provides that:

"The said lessees do further by these presents hereby deposit and turn over to the lessor the sum of Ten Thousand Dollars ($10,000), the receipt of which is hereby acknowledged, which said Ten Thousand Dollars ($10,000) is to be held by said lessor and applied in payment of the rent for the final months under this lease, and taxes for the year 1922; and in case this lease is for any reason forfeited or declared null and void on account of any fault of the said lessees for the nonpayment of rent or otherwise, then said Ten Thousand Dollars ($10,000) shall be and become the property of said lessor. During the life of this lease, however, the said lessor shall pay to the said lessees interest on said deposit, until the said sum is taken over by the said lessor in payment of rent or by forfeiture, annually, at the rate of six per cent (6%) per annum."

The lease is for a period of ten years, the interest alone would be $600 per annum and upon the theory that the $10,000 was an actual payment to the defendants at the time of the execution of the lease the defendants would then be paying plaintiff $600 per annum as interest for the use of their own money. As we understand it, a deposit is made when one person gives to another with his consent the possession of personal property to keep for the use and benefit of the first or a third party.

2, 3. Under the record we construe the lease to mean that the $10,000 was a deposit with the lessors; that the title to the money remained in the lessees, subject to the terms and conditions of the lease, and that

it was not an actual payment to the lessors at the time of the execution of the lease. The question is then presented as to whether the $10,000 is a penalty or liquidated damages. The case of *Cunningham* v. *Stockton,* 81 Kan. 780 (106 Pac. 1057, 19 Ann. Cas. 212), is almost identical with the case at bar and it was there held:

"That the deposit could not, under the circumstances, be regarded as liquidated damages, and that when the landlord elected to dispossess the tenant he terminated the lease and ended the obligation of the tenant under it for the remainder of the term and was not entitled to retain the deposit, except so much of it as was necessary to pay the rentals which had accrued when possession was taken."

In *Caesar* v. *Rubinson,* 174 N. Y. 492 (67 N. E. 58), it was held that:

"The landlord, having asserted his right to re-enter for failure of the tenant to pay a monthly rent of $45, * * thereby waived the claim to the deposit except so far as it was necessary to apply it in payment of rent then due or accrued."

The New York case is cited and approved by this court in a well-considered opinion by Mr. Justice RAMSEY in the case of *Yuen Suey* v. *Fleshman,* 65 Or. 606–613 (133 Pac. 803), in which the facts were very similar to those in the present case. It was there held that:

"The $5,000, deposited by the respondent, should be regarded as a penalty to secure the performance of the conditions of the lease on the part of the lessee, and *not* as liquidated damages."

In that case the appellant elected to terminate the lease for nonpayment of rent and ejected the respondent by an action at law. It was said that:

"This effectually terminated the tenancy, and exonerated the lessee from all liability for rent not due at the time of such ouster."

The same rule is laid down in the case of *Northern Brewery Co.* v. *Princess Hotel*, 78 Or. 453 (153 Pac. 37), and the rule is sustained by the weight of authority.

We hold that under the terms and provisions of the lease the $10,000 was a deposit and was not an actual payment; that it should be treated as a penalty and not as liquidated damages; that the complaint states a cause of action and that the demurrer should have been overruled. The judgment of the lower court is reversed and the cause remanded with the right of the defendants further to plead.

REVERSED AND REMANDED.

BEAN, BURNETT and HARRIS, JJ., concur.

Argued May 29, affirmed June 11, rehearing denied July 9, 1918.

THOMAS *v.* PEEBLER.

(172 Pac. 648.)

Statute of Frauds—Pleading—Demurrer—Leases—Validity.

1. A complaint alleging an oral contract on June 16th to remodel a building, and on completion of changes to lease to defendant for one year, and that on August 15th a lease for one year in accordance with the agreement was made operative by giving and taking possession, was not demurrable as pleading an invalid contract under Section 808, subdivision 6, L. O. L., making void a lease for a period longer than one year.

Appeal and Error—Presumptions—Finding of Court.

2. The findings of fact by the trial court sitting without a jury being equivalent to a verdict, the court on appeal must, in the absence of a bill of exceptions, presume that there was evidence to support them.

Pleading—Redundancy.

3. Where complaint alleged oral contract on June 16th to remodel building, and on completion of changes to lease to defendant for one year, and that on August 15th a lease for one year in accordance with the agreement was made operative by giving and taking possession, the allegations as to the contract of June 16th were unnecessary and redundant.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 1.

The parties agree that the plaintiff is the owner of the storeroom and premises in question. The complaint narrates an oral agreement made on June 16, 1914, to the effect that the plaintiff was to make certain changes in the premises, fitting them for the defendant's use, and that in pursuance thereof the alterations were made. Then comes this averment:

"That on said 15th day of August, 1914, plaintiff leased, let and demised to the defendant, and defendant leased, occupied and entered into the possession of said premises for a period of one year all in accordance with said agreement of June 16th, 1914, and defendant agreed to pay to the plaintiff during said period of one year the said sum of $540, in installments of not less than $45 each."

This is followed by the statement to the effect that the defendant paid $405 on account of the rent reserved and without the consent of the plaintiff abandoned the premises on May 15, 1915; that from that time to June 30, 1915, no one paid the rent; that at the latter date the plaintiff succeeded in getting a new tenant who took possession and remained there and paid the rent during the rest of the term. There is another statement that prior to the defendant's taking possession plaintiff importuned him to execute a written lease for the one-year term, but the latter put him off, claiming "that his word was as good as his

bond." A general demurrer to the complaint was overruled.

Except as stated at the outset, the answer traversed all the averments of the complaint. One affirmative defense is that the defendant occupied under a month-to-month lease and paid for the full time of his occupancy. A second is that after the defendant removed from the premises the plaintiff accepted from him in full settlement of the claim arising out of the occupancy of the property a certain stove of the value of $16; and, lastly, that the alleged oral agreement of June 16, 1914, was one which was not to be performed within a year from that date and consequently is void under the statute of frauds.

Otherwise than as stated in the complaint the reply joins issue upon the answer. After a trial without a jury, the court made findings of fact and conclusions of law substantially in consonance with the allegations of the complaint and against the contentions of the answer. Judgment was rendered upon them in favor of the plaintiff and the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Oliver M. Hickey* and *Mr. Frank E. Swope*, with an oral argument by *Mr. Hickey*.

For respondent there was a brief and an oral argument by *Mr. W. B. Shively*.

BURNETT, J.—1. There is nothing before us as data for a decision except the pleadings, findings of fact and conclusions of law and the resultant judgment, to which alone we are confined in our investigations as there is no bill of exceptions. The argument has taken

the form of a debate upon the sufficiency of the complaint. The defendant contends that it is disclosed that the agreement was made on June 16th and was not to be performed within a year, and that its being oral makes it void under the statute of frauds: Section 808, subd. 1, L. O. L. This contention, however, is fallacious, for the complaint directly alleges that a lease was made by the parties on August 15th for one year; that under it the defendant took possession of the property and agreed to pay for the term $540 in installments of not less than $45 each. The contract embodied in this statement of the complaint is valid, for the statute of frauds declares void only "an agreement for the leasing for a longer period than one year, or for the sale of real property or of any interest therein": Section 808, subd. 6, L. O. L.

2, 3. The findings of fact in a trial by the court are equivalent to a verdict and in the absence of any bill of exceptions we must presume that there was evidence before the court competent to prove the quoted allegation, and the verdict therefore cannot be disturbed. The averments of the complaint as to the preliminary bargaining were unnecessary and might have been left out. If they had been attacked as redundant instead of irrelevant and immaterial it would have been proper to strike them from the pleading.

In *White* v. *Holland,* 17 Or. 3 (3 Pac. 573), cited by the defendant, it appeared by the record that the lease relied upon was actually made on January 20th for one year, to commence March 1st, thereafter. The whole agreement was made at the earlier date. No subsequent stipulation was counted upon and hence as this was oral and not to be performed within one year the court was right in declaring it void. In *Dechenbach* v. *Rima,* 45 Or. 500 (77 Pac. 391, 78 Pac. 666),

the latter had bought out a previous tenant of the plaintiff with the expectation of securing a new lease from the landlord for a term of three years, but without taking any writing from anyone to that effect. After he had come into possession as subtenant, without any lease from the owner of the property, Rima sought to defend an action of forcible entry and detainer on an alleged oral promise of Dechenbach to make such a lease. The substance of the ruling was that he had no competent evidence to sustain such a pleading as there was no writing embodying the contract alleged. *Bowman* v. *Wade,* 54 Or. 347 (103 Pac. 72), was a case in which the plaintiff sought to recover money loaned on an oral agreement to the effect that it should be paid in three years with interest at 10 per cent. The court held that the recovery could not be had upon such a contract, because it was not in writing and could not be performed in one year. A recovery of the money with interest at 6 per cent was permitted, however, upon the implied contract deduced from the facts stated in the pleading, as for money had and received. These cases cited by the defendant are not by the mark in the present juncture.

The essence of the complaint is found in the allegation of a verbal lease of August 1, 1914, made for one year. Despite the surplusage, there is enough in the pleading to authorize a recovery. There is no basis upon which to challenge the findings of fact. The conclusion of law to be drawn from those findings is correct and judgment must be affirmed.

AFFIRMED. REHEARING DENIED.

BEAN, BENSON and HARRIS, JJ., concur.

Argued May 28, affirmed July 9, 1918.

AKIN *v.* BATES.

(173 Pac. 889.)

Trusts—Transfer of Interest in Corporation—Evidence.

1. Plaintiff's allegations that he transferred corporation stock and plant, in consideration of its being financed and made to pay, and that a subsequent sale of the plant by a corporation organized to take over the business merely operates as a transfer in trust of the plaintiff's interest, *held* not supported by the evidence.

Corporations—Conveyance by Corporation—Estoppel of Officer.

2. A stockholder and officer, present at the meeting authorizing a transfer of the corporation plant, and later a party to the deed of transfer, and who becomes a stockholder in a corporation organized to carry on the business, and who fails to question the transaction for seven years, is equitably estopped from impeaching the sale.

[As to who may object to sale of property by corporation as *ultra vires*, see note in Ann. Cas. 1916A, 839.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

This is a suit brought by the appellant on behalf of himself and Diamond Vitrified Brick Company against the defendants for an accounting. The complaint sets forth that he was, on January 18, 1899, the owner and in possession of a brick and tile plant at Russell in the State of Washington; that George W. Bates, now deceased, Sidney Smyth, Harry Howard, Edward G. Crawford, A. W. Ocobock and plaintiff, organized the defendant Diamond Vitrified Brick Company with a capital stock of $25,000; that George W. Bates received 62½ shares, Harry Howard 31¼ shares, Sidney Smyth 31¼ shares, F. S. Akin 117 shares, Edward G. Crawford 3 shares and A. W. Ocobock 5 shares in said company; that a stockholders' meeting was held and Bates was elected president and Akin vice-president of said company; that on April 27, 1899, plaintiff sold and delivered to the Diamond Vitrified Brick Company his

brick and tile plant, including lands, tools, machinery, stock on hand and goodwill, and that the plant was valued at such sale at the sum of $25,000, a price much less than its real value, and that plaintiff accepted 117 shares for his said plant; that Bates, Howard and Smyth paid no other or further sum than $3,000 for their shares; that Bates, Howard and Smyth had the entire management of the plant and that the products of the plant between the eighteenth day of January, 1899, and the twenty-sixth day of August, 1902, were $35,000; that Bates fraudulently represented and stated to the plaintiff that the debts of the prior company necessitated and required that the property be sold to pay the same and that appellant relied on said statements, and that the same were not true; that on or about August 26, 1902, an attempted sale was made of the plant to Bates, who was then the president of the company, in trust upon the understanding and agreement that Bates was to hold the plant in trust to be sold or operated by Bates in his discretion and the debts of the prior company be paid from the operation of the plant or from the proceeds of any sale thereof, and that the balance, if any, was to be returned to the Diamond Vitrified Brick Company to be distributed among the shareholders of said company; that Bates, on August 26, 1902, took possession of the plant, which was of the value of $60,000 on said date, and that he, together with other persons, organized the Diamond Brick Company and that he proceeded to operate the plant through and by means of said Diamond Brick Company; that Bates never assigned or transferred to the Diamond Brick Company any of the assets of the Diamond Vitrified Brick Company, but continued to retain the assets of said Diamond Vitrified Brick Company in his own name; that the Diamond Brick Company was

merely a device used by Bates to cover his operations of the plant of the plaintiff; that the plant and its operations and the proceeds thereof were at all times under the direction and control of Bates; that a profit was realized from the operation of the plant above all expenses and debts in the sum of $75,000, and that sum was the property of the stockholders of the Diamond Vitrified Brick Company; that on or about the eleventh day of December, 1911, Bates through his control of the stock of the Diamond Brick Company, sold and disposed of all of the assets of the Diamond Vitrified Brick Company for the sum of $200,000 to the Columbia Clay Company, and that defendant Bates was paid in cash, notes, bonds and securities said sum and that he held the same in trust for the stockholders of the Diamond Vitrified Brick Company; that appellant as soon as he discovered the sale to the Columbia Clay Company, demanded from Bates that he account to the Diamond Vitrified Brick Company for the profits received from the operation of the plant, and that he account for the proceeds of the sale thereof; that Bates refused to account and refused to pay plaintiff anything for his property; that the officers of the Diamond Vitrified Brick Company and of the Diamond Brick Company were at all times under the control and domination of Bates, and that said officers of the Diamond Vitrified Brick Company would not consent to an action or suit to compel Bates to account to the Diamond Vitrified Brick Company, or to the plaintiff, or to anyone, for the property he received from it or for the profits from the use of the plant thereof, and that it was necessary that plaintiff be allowed to maintain this suit in order to conserve and protect the Diamond Vitrified Brick Company and its stockholders; that the entire management and control

of the operations of the Diamond Vitrified Brick Company and its plant and property was in said Bates, and that the appellant had no plain, speedy or adequate remedy at law; that the appellant offered to do in equity all things on his part, and do and perform such acts as the court may direct him in order to render complete equity between all the parties.

Answers were filed by the defendants and a third amended answer consisted of denials and also certain further defenses to the effect that the appellant was in the control of said Diamond Vitrified Brick Company, and that a certain contract was entered into between the appellant and Bates, Howard and Smyth in regard to the organization of the Diamond Vitrified Brick Company and the purchase of appellant's plant. Certain allegations were made in the answer in regard to the incorporation of the Diamond Brick Company and the taking of stock therein by the appellant, together with an admission that the plant was sold to the Columbia Clay Company for $107,500. In a second further separate answer the defendants allege in substance an acquiescence and estoppel against the plaintiffs.

A reply was filed denying the new matter alleged in the answer and alleging that Bates falsely and fraudulently represented and stated to the appellant that it was necessary to organize the Diamond Brick Company in order to perfect the trust agreement in regard to the transfer of the assets of the Diamond Vitrified Brick Company to him and to carry on and operate the business and that appellant relied upon said statements and did not know to the contrary, and consented and signed the note and agreement set forth in the answer and not otherwise; that appellant never took any part in the proceedings of the Diamond Brick Com-

pany, and that he was not notified of any actions or proceedings to sell the Diamond Brick Company's plant.

Based upon the foregoing there were findings and a decree for defendants, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Malarkey, Seabrook & Dibble* and *Mr. William C. Benbow,* with an oral argument by *Mr. E. B. Seabrook.*

For respondents there was a brief over the names of *Messrs. Giltner & Sewall* and *Mr. Guy C. H. Corliss,* with oral arguments by *Mr. R. R. Giltner* and *Mr. Corliss.*

McBRIDE, C. J.—There is no substantial dispute in this case as to the principles of law that should be applied as they are fundamental. The decision, therefore, rests upon a consideration of the facts as disclosed by the testimony which, in this case, is very voluminous and its examination has consumed much time and labor. At the conclusion of the examination we find the facts to be as follows: In 1895 the Oregon Brick Paving Company was the owner of a brickyard and plant situated near the City of Vancouver in the State of Washington; the company became insolvent and passed into the hands of a receiver and in the year last mentioned plaintiff purchased it, paying therefor the sum of $7,176. He then organized a corporation known as the Jensen Paving Company, which operated the plant without success until about the time of the transfer hereinafter alluded to, when through Sidney Smyth and Harry Howard, composing a firm of

paving contractors under the firm name of Smyth & Howard, he was put into communication with George W. Bates, now deceased, and originally the principal defendant in this suit. Bates was the head of the banking firm of George W. Bates and Company and apparently without knowledge or experience in the manufacture of brick and its kindred products. The business of the Jensen Paving Company had proved a financial failure and it was represented by plaintiff to Smyth & Howard that if someone could be found who would put $3,000 into the business, it could be made a success. The result of the conversation between plaintiff and Smyth & Howard was that the two latter interested Bates in the matter and through their representations and those of plaintiff, Bates was induced to contribute $1,500 of the required $3,000, Smyth and Howard contributing $750 each in consideration of which advance the plaintiff sold to them a one-half interest in the Jensen Paving Company. The transfer was made by means of a written agreement which provided that Akin should convey a one-fourth interest in the property owned by the Jensen Paving Company to George W. Bates, and a one-eighth interest to Sidney Smyth and Harry Howard respectively; that a new company should be incorporated under the laws of the State of Washington, with a capital stock of $25,000 to be divided into 250 shares of the par value of $100 each, said corporation to be known as the Diamond Vitrified Brick Company; that Akin should subscribe or cause to be subscribed 125 shares; Bates 62½ shares, Smyth 31¼ shares, and Howard 31¼ shares, and that each of the parties should pay for the stock subscribed by him by conveying or causing to be conveyed to the proposed corporation his interest in the land and plant of the Jensen Paving Company, the whole value of the

land and plant being fixed at $25,000. It was further agreed that Bates should pay into the treasury of the corporation $1,500, and Smyth and Howard $750 each, said fund to be used for operating expenses. The corporation was organized as agreed upon and the $3,000 paid in by Bates, Howard and Smyth, and the Jensen Paving Company lands and plant were duly conveyed to it.

The officers of the Diamond Vitrified Brick Company were George W. Bates president, F. S. Akin vice-president, A. P. Tifft, plaintiff's son-in-law, treasurer, and Sidney Smyth, secretary. Howard was chosen manager but was absent a great portion of the time, therefore plaintiff was to a great extent the actual manager as well as bookkeeper, and either by bad management or from other causes the concern ran behind and contracted an indebtedness of $20,700. Finding it impossible to run the works without loss the plant was closed down. Most of this indebtedness was due the banking firm of George W. Bates & Company and was secured by notes of the Diamond Vitrified Brick Company, which notes were indorsed by Akin, Bates, Smyth and Howard. Bates declined to finance the company further as there appeared little hope at that time that the enterprise would prove a success, as the clay was not of a quality to ensure the successful manufacture of brick. The real moneyed man of the group interested seems to have been George W. Bates, and it is apparent that if the company had been pressed for payment of its indebtedness he would probably have been the principal loser. An attempt was made to increase the capital stock and to put the corporation on its feet again by stock sales, but nobody was found who was willing either to buy the stock or the property, the sale of which plaintiff vainly tried to negotiate. In

view of the critical condition of the company's financial affairs a stockholders' meeting was held on August 26, 1902, at which more than three-fourths of the stockholders as shown by the stock books were present, the only absent stockholders being persons, the beneficial title to whose stock was actually in plaintiff. The minutes of the meeting show, among other things, the following:

"The object of the meeting being to discuss and devise ways and means for paying and providing for the company's indebtedness. It appearing that the company's income is insufficient to pay the interest on the company's debt and anything on the principal of the debt.

"That the company's debt is increasing rather than diminishing, and that the debts of the company are past due and pressing.

"After general discussion, indulged in by all the stockholders, upon motion duly made and carried, the directors of the company were ordered and instructed to transfer and deed the company's real estate and plant and brick on the yard to Geo. W. Bates, he agreeing to assume and pay all the company's debts in consideration therefor.

"No further business appearing, upon motion the special meeting of the stockholders adjourned."

The following also appears:

"Vancouver, Wash., Aug. 26, 1902.

"The stockholders of the Diamond Brick Company hereby authorize and instruct the directors of the company by their proper officers, to transfer the company's real estate, plant and all other assets to George W. Bates in payment of all the company's debts amounting in round numbers to $20,000.00, the said debts being all past due and the company being without funds to pay its said debts and current expenses."

Which was signed by all the stockholders present either in person or by proxy, including plaintiff.

Thereafter an absolute deed of all the property was made to Bates, which was signed by Akin as vice-president.

Thereafter Bates proceeded to organize a new company called the Diamond Brick Company to operate the plant. It was capitalized at $25,000 which was paid for by Bates selling the plant conveyed to him by the former company to the new company. Fifty shares in the new company were allotted to Akin in consideration of his agreement to pay one fifth of the debts paid by Bates on account of the debts of the old company. These shares were subscribed for by him and paid for by giving his note for $4,150 to George W. Bates & Co., payable in one year with 7 per cent interest and at the same time transferring to George W. Bates & Co. the 45 shares of stock as collateral security for the payment of the note, with authority to sell said collateral at public or private sale in case the note was not paid at maturity. Plaintiff was one of the directors of the new company and attended the first directors' meeting, participated in the adoption of the by-laws of the company, and also attended the stockholders' meeting on September 5, 1903. The new concern did not meet with any better success than the previous one. Plaintiff failed to pay his note given for stock subscription or to answer any letters requesting payment, and finally on March 24, 1908, the stock which he had deposited as collateral was actually sold. If the proceedings with respect to the sale from the Diamond Vitrified Brick Company to Bates, were regular and in good faith, what they appear to be on their face, plaintiff ceased to have any further interest in the company or in the property which he had transferred to the Diamond Vitrified Brick Company, and he was in fact entirely silent as to any claim to the

property or the stock of any of the corporations which had operated the plant until 1912, when he learned that Bates had sold the property. The contentions of plaintiff are these:

"That in the beginning Bates agreed with plaintiff in consideration of a transfer to him, Smyth and Howard of a one-half interest in plaintiff's plant, that he would, if given control, finance it and put it on a paying basis. That Bates did finally put it on a paying basis and has sold the entire plant and should now account for the profits for the use of Akin's share and for the proceeds of the sale thereof.

"That the attempted transfer to Bates of the property of the Diamond Vitrified Brick Company was void and only amounted to a transfer in trust so far as Akin's interest therein is concerned.

"That, if the 45 shares of stock issued to Akin be held to have been legally issued, then, they were converted by Bates and his banking-house and he and the bank should account therefor."

Not one of these contentions is supported by the preponderance of evidence, but each rests substantially upon the uncorroborated statements of plaintiff.

1. Plaintiff's testimony as to the first proposition is flatly contradicted by Bates, Smyth and Howard, the two latter having no present interest in the result of the controversy. Bates was a man of business experience and financial sagacity and it is almost inconceivable that he would embark on a business enterprise concerning the practical workings of which he knew nothing, and absolutely bind himself to make it a financial success. Plaintiff's testimony is also contradicted by the written agreement of the parties which indicates that the consideration for the transfer was the sum of $3,000 to be paid into the treasury of the proposed new company by Bates, Smyth and Howard. It is idle

to discuss the amounts paid for the property by Akin or the value of the plant or the amounts fruitlessly expended in the endeavors to make the business a success. The fact is potent that the enterprise was a failure and that Akin was at the end of his tether, and he was compelled either to get somebody associated with him who might make it a paying venture or lose everything. Smyth and Howard were contractors engaged in street paving, and plaintiff no doubt built largely upon a prospect that they would be able to obtain contracts, whereby they could use large quantities of the vitrified brick which he hoped his plant would be able to produce. He thought he knew the capabilities of his plant and that with the help of these contractors and the ready money which they had agreed to put into the business he could retrieve his fortunes and by so disposing of a one-half interest in a losing concern, make the other half a dividend payer. That his hopes resulted in failure; that the clay would not produce vitrified brick in sufficient quantities or of the required quality to fulfill his expectations, was neither his fault or that of Bates, Smyth or Howard, but arose from conditions over which none of the parties had any control.

2. The second contention is directly in the teeth of the pleadings, which assume a valid transfer of the stock of the Diamond Vitrified Brick Company to Bates, but claim that it was in trust and to be held by him as security for the payment of debts of the company and to be reassigned to the stockholders when such debts were paid. Plaintiff is therefore confined to this issue and it is needless to discuss the legality of the proceedings by which the transfer was authorized, although it may be remarked in passing that plaintiff as a stockholder and officer of the company was pres-

ent at the stockholders' meeting where the transfer was authorized and consented thereto, and subsequently upon Bates assuming and paying the debts of the Diamond Vitrified Brick Company, signed as vice-president of the company a deed conveying to Bates absolutely the property of the company. Under these conditions, even if the pleadings are disregarded, Akin is in no position to say that the sale was not properly authorized. But upon the issue tendered by the pleadings, plaintiff is contradicted by the testimony of four witnesses, Bates, Smyth, Howard and Tifft, as well as by the fact that he became a member of the new corporation which Bates projected, the Diamond Brick Company, subscribed for 45 shares of its stock, gave his note for $4,150 secured by the deposit of the shares as collateral security in payment of the shares, and subsequently upon default of payment allowed the shares to be sold without protest and the proceeds of the sale to be applied upon the indebtedness evidenced by the note. We think the testimony indicates that plaintiff was more familiar with the business of the Diamond Vitrified Brick Company than any other person connected with it, and that he consented to these transfers knowing just what he was doing, and that they are fair and untainted by fraud. It is true that after plaintiff had lost his interest in the property Bates, by the lucky discovery of the fact that by the addition of Rosland shale to the clay and by the investment of large sums of money in additions and improvements, was enabled to make the plant pay a profit and thereby sell it for a considerable sum, but this gives plaintiff no legal right to participate in the profits which would have inured to him if he had paid for his stock according to the terms of the note which he executed when he subscribed for it.

It is worthy of note that no officer or stockholder of the Diamond Vitrified Brick Company has participated in plaintiff's attempt to impeach the sale to Bates. If there is any recovery here it is for Akin's sole benefit. The other stockholders have pocketed their losses and do not complain. Ever since 1908, when plaintiff's 45 shares of stock in the Diamond Brick Paving Company were sold, he has stood by without protest and allowed Bates to invest large sums of money in bettering the property upon the theory that it was his own and no doubt believing that it was his own, and now seeks to impeach the sale upon the pretext, not charged in the pleadings, that the transfer was illegal and unauthorized. He has acquiesced in the transfer by Bates of the whole *corpus* of the property to another corporation and has himself been a stockholder in that corporation and participated in the stockholders' meetings. It is inconceivable that Bates would have made the investments that he did, to make the property profitable, if plaintiff from 1903 to 1910 had asserted the claims he now makes, and informed Bates that while he (Akin) declined to risk anything to improve the property even to the extent of paying for the stock he had subscribed, he expected to participate in any profits that might ensue if the venture should prove successful. He is equitably estopped from impeaching the regularity of the proceedings leading up to the final conveyance to Bates, both by having participated in the transfer and by his silence when he had every reason to believe that Bates was honestly proceeding upon the theory that the sale had been properly authorized: 1 Cook on Corporations, §§ 143, 144; 3 Ibid., 2607, 2609, 2614, 2666.

Some question has been raised as to the regularity and good faith of the sale of the stock to Ambrose, but

this contention is not sustained by the testimony. To consider the testimony in detail would expand this opinion into a volume. The complaint charges fraudulent representations and concealments by Bates in regard to the condition of the property, but these are not sustained by the testimony. The trial judge, who heard the testimony and saw the witnesses was better able than we to judge of their credibility, was of the opinion that plaintiff had failed to establish his case upon the facts, and in that conclusion we concur and the decree of the Circuit Court is affirmed.

AFFIRMED.

BENSON, BURNETT and HARRIS, JJ., concur.

Argued June 20, affirmed July 9, 1918.

LISENBY *v.* LISENBY.

(173 Pac. 888.)

From Multnomah: GEORGE W. STAPLETON, Judge.

Department 1.

The plaintiff sued for and was granted a decree of divorce. The defendant was given the custody of the two children, one of whom is now about 4 years of age and the other is now about 2 years of age. The father was directed to pay $30 per month to the mother for the maintenance of the children. The defendant did not ask for any affirmative relief but her answer contained only a general denial and a prayer for the dismissal of the suit. The plaintiff was satisfied with the decree but the defendant appealed. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Samuel W. Stark.*

For respondent there was a brief and an oral argument by *Mr. Charles E. Lenon.*

HARRIS, J.—No useful purpose could possibly be accomplished by a detailed recital of the unhappy conditions which brought about the separation of the plaintiff and defendant. An examination of the record cannot but impress the reader that the plaintiff is a patient husband, kind father and a hard-working man; that the defendant is a good mother and a virtuous woman; and that in all likelihood harmony rather than discord would have prevailed had the parties lived alone and in a home of their own instead of attempting to live under the same roof with relatives, well meaning though they were. The trial court made an earnest attempt to effect a reconciliation. The plaintiff was willing to act upon the court's suggestions, but when the defendant refused, the court chose the only alternative and granted the plaintiff a decree of divorce. Neither party was allowed costs. It is enough to say that the entire record has been examined and that, on the facts disclosed by the record, the plaintiff was entitled to a decree of divorce. The decree of the Circuit Court is affirmed, but without costs to either party in this court. AFFIRMED.

McBRIDE, C. J., BEAN and BURNETT, JJ., concur.

Argued June 18, affirmed July 9, 1918.

SWENSEN v. SOUTHERN PAC. CO.

(174 Pac. 158.)

Statutes—Repeal by Implication.

1. A repeal by implication may be effected when a later conflicts with a prior statute, when one is intended as a substitute for another.

Statutes—Repeal by Implication—Conflict.

2. One statute will not be presumed to be repealed by another, unless the two are so obviously in conflict that both cannot be executed.

[As to repeal of statute by implication, see note in **14 Am. Dec.** 209; **88 Am. St. Rep.** 271.]

Statutes—Repeal by Revision.

3. If the new statute revises the subject matter of the old, and is plainly intended as a substitute, it will repeal the old statute.

Statutes—Repeal—Repugnancy.

4. One statute is not repugnant to another, unless they relate to the same subject, and are enacted for the same purpose.

Statutes—Implied Repeal.

5. If the objects of two statutes are not the same, they will be permitted to stand, although referring to the same subject.

Railroads—Regulation—Fencing—Statutes.

6. Section 6972, L. O. L., making a railroad company liable for injury to livestock for failure to fence, is not repealed by Section 6979, requiring the maintenance of fences along railroad tracks for the protection of travelers; the two statutes being cumulative and not enacted to accomplish the same purpose.

Railroads—Regulation—Fencing.

7. In the absence of statute, there is no duty to fence a railroad.

From Polk: HARRY H. BELT, Judge.

Department 1.

The defendant appealed from a judgment awarding the plaintiff damages for the loss of a calf and a horse struck by cars operated along an unfenced track. Between Black Rock and Salem, Oregon, a line of railway, commonly known as the Salem, Falls City & Western Railroad, is operated by the Southern Pacific Company. The railroad right of way had not been

fenced along its entire length and upon application of the owner of the road the Railroad Commission, now known as the Public Service Commission, made an order on November 7, 1911, relieving the owner "from the duty of maintaining a fence at those portions of its line remaining unfenced at this time embraced in the above entitled application."

The plaintiff was in the possession of a tract of land called the Emmens farm, across which the line of railway extended. The track was unfenced throughout its entire course across the farm. In 1915 a car operated by the defendant struck and killed a calf on this unfenced portion of the track and in the same year and at the same place a horse was hit by a car and was so badly injured that it became necessary for the plaintiff to kill the animal. The calf and the horse had been turned out to pasture on the farm and they went upon the track. The order which the Railroad Commission issued in 1911 has never been rescinded but is still in force. AFFIRMED.

For appellant there was a brief over the names of *Mr. Paul P. Farrens* and *Mr. Ben C. Dey,* with an oral argument by *Mr. Farrens.*

For respondent there was a brief and an oral argument by *Mr. Oscar Hayter.*

HARRIS, J.—The only question for decision is whether the order issued by the Railroad Commission relieved the defendant from liability for stock subsequently killed on its unfenced track; and this question is decided by determining whether or not a statute enacted in 1887 (Laws 1887, page 50), and carried into the present code as Sections 6972 to 6977, L. O. L., in-

clusive, was repealed by an act which was passed in 1909 (Laws 1909, Chapter 158), and codified as Sections 6979 to 6983, L. O. L., inclusive; or to narrow the inquiry to two sections of the Code the question presented by this appeal is whether Section 6972 is repealed by Section 6979, L. O. L. Before attempting to answer the question it will be necessary first to notice the provisions of the act of 1887 and then to direct attention to the statute of 1909.

The act of 1887 contains 6 sections in addition to the emergency clause and is entitled as follows:

"AN ACT for the Protection of Live Stock, and to Compel Payment for Live Stock Killed or Injured on any Unfenced Railroad Track, and to Provide for the Giving of Notice to Owners of such Killing of Live Stock, and Prescribing the Penalty for Failure to Give such Notice, and do (to) Define Negligence in Suits or Actions for the Recovery of the Value of Live Stock so killed or Injured."

Section (1), being Section 6972, L. O. L., provides that any person or corporation operating any railroad within the state shall be liable for the value of any horses or calves or other specified animals killed upon any unfenced track by moving cars. Section (2) states what shall be deemed to be a sufficient fence. Section (3) requires the operator of a railroad line to give a prescribed notice when any animal is killed or injured. Section (4) fixes a penalty for failure to give the notice. Section (5) declares that proof of the killing or injury of stock shall be evidence of negligence and Section (6) designates the persons upon whom process may be served.

The act of 1909 contains 5 sections and bears the following title:

"To provide for the better protection of travelers on railroads by requiring the construction and maintenance of fences along railroad rights of way, and providing penalties for the violation of this act."

Section (1), being Section 6979, L. O. L., provides that every owner or operator of a railroad within the state shall fence and maintain its railroad line,

"except at the crossings of and upon public roads and highways, and within such portions of cities and incorporated towns and villages as are or may be hereafter laid out and platted in lots and blocks, and except at railroad station grounds and except within the boundaries of federal forest reserves, * * "

Section (2) states that a failure to fence a railroad track shall result in a forfeiture of a hundred dollars per mile of such unfenced track "to be recovered as other penalties are recovered and be paid into the State Treasury." Section (3) authorizes certain officers of the state to maintain *mandamus* proceedings to compel compliance with Section 1. Section (4) fixes a penalty for leaving a gate open and the concluding section reads thus: "The provisions of this act are cumulative to existing remedies." Section (1) of the act of 1909 was amended in 1911, Laws of 1911 Chapter 150. The amendment authorizes the Railroad Commission, after notice and hearing to "suspend the operation of this section as to any particular portion of any line of railroad."

The act of 1911 amending Section 1 of the statute of 1909 is entitled thus:

"To amend Section 6979 of Lord's Oregon Laws, the same being Chapter 158 of the laws of the Legislative Assembly of the State of Oregon for the year 1909."

The first 6 sections of the act of 1887 were carried into the 1887 edition and also into the 1892 edition of

Hill's Annotated Laws of Oregon, as Sections 4044 to Section 4049 inclusive; and when Bellinger & Cotton's Annotated Codes and Statutes were issued in 1902, these six sections appeared as Sections 5139 to 5144 inclusive. When the compilation known as Lord's Oregon Laws was published in 1910, pursuant to the authority of an act approved in March, 1909, the entire six sections of the statute of 1887 with the whole of the statute of 1909 were made a part of that Code.

The plaintiff contends that the order made by the Railroad Commission merely relieved the owner of the railroad from the penalty fixed by Section 2 of the act of 1909, codified as Section 6980, L. O. L., and that it did not relieve the defendant from liability to the owner of stock killed or injured upon the unfenced track. The company argues that the act of 1909 repealed the act of 1887, and that after such repeal the act of 1909 was the only statute in force requiring tracks to be fenced; and that therefore relief from the duty imposed by the act of 1909, left the company relieved of all duty to fence its tracks.

1–5. The statute passed in 1909 does not expressly repeal any prior law. If the act of 1887 is repealed at all it is only by implication. A repeal by implication may be effected when a later conflicts with a prior statute or when one is intended as a substitute for another act. It is so easy for the legislature, when adopting one statute, to say that another statute on the same subject is repealed, and an intention to repeal, when it exists, is so likely to be expressly stated, that the courts will not presume that the later repeals the prior statute unless the two are so obviously in conflict that both cannot be executed. A repeal by implication is effected if there be such positive repugnancy between the new and the old enactments that they cannot stand

together or be harmonized; but the courts will, however, if possible, construe the two statutes together and adopt any reasonable construction which will sustain both of them: *Palmer* v. *State,* 2 Or. 66, 69; *Winters* v. *George,* 21 Or. 251, 257 (27 Pac. 1041); *Pacific Elevator Co.* v. *Portland,* 65 Or. 349, 387 (133 Pac. 72, 46 L. R. A. (N. S.) 363); *Messick* v. *Duby,* 86 Or. 366, 369 (168 Pac. 628). If the new statute revises the subject matter of the old and is plainly intended as a substitute it will operate as a repeal of the old statute: *Strickland* v. *Geide,* 31 Or. 373, 376 (49 Pac. 982). One statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose: *Pacific Elevator Co.* v. *Portland,* 65 Or. 349, 388 (133 Pac. 72, 46 L. R. A. (N. S.) 363). As said in *Haywood* v. *Mayor etc. of Savannah,* 12 Ga. 404, 409, "where there is a difference in the whole purview of two statutes, apparently relating to the same matter, the former remains of force." If the objects of both statutes are not the same, the two statutes will be permitted to stand although they may refer to the same subject: *United States* v. *Claflin,* 97 U. S. 546, 552 (24 L. Ed. 1082); *Perrit* v. *Crouch,* 5 Bush (68 Ky.), 199; *McMillan* v. *Board of Commrs. of Payne County,* 14 Okl. 659 (79 Pac. 898). Nor is it sufficient, as said by Mr. Justice STORY in *Wood* v. *United States,* 16 Pet. 342, 362 (10 L. Ed. 987), "to establish, that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative or auxiliary": See, also, *Bank of British North America* v. *Cahn,* 79 Cal. 463 (21 Pac. 863); *State* v. *Wells,* 210 Mo. 601 (109 S. W. 758); *Jessee* v. *De Shong* (Tex. Civ.), 105 S. W. 1011. Speaking of two acts or provisions of law relating to the same subject Mr. Justice FIELD says in *Chicago M. & St. P. Ry. Co.* v.

United States, 127 U. S. 406, 409 (32 L. Ed. 180, 8 Sup. Ct. Rep. 1194):

"Effect is to be given to both, if that be practicable. If the two are repugnant, the latter will operate as a repeal of the former to the extent of the repugnancy. But the second act will not operate as such repeal merely because it may repeat some of the provisions of the first one, and omit others, or add new provisions. In such cases the later act will operate as a repeal only where it plainly appears that it was intended as a substitute for the first act."

6. Tested by the standards which have been so firmly established in our system of jurisprudence the act of 1909 does not repeal the act of 1887.

7. In the absence of a statute there is no duty to fence a railroad: *Todd* v. *Pacific Ry. & Nav. Co.,* 59 Or. 249, 252 (110 Pac. 391, 117 Pac. 300). The primary purpose of the act of 1887 was as stated in its title "for the protection of livestock, and to compel payment for livestock killed or injured on any unfenced railroad track"; and it is worthy of notice that the emergency clause found in Section (7) of the act declares that:

"Inasmuch as loss of stock, without adequate means of obtaining remuneration therefor, is of frequent occurrence in this State, this Act shall take effect and be in force from and after its approval by the Governor."

The primary purpose of the act of 1909 as expressed in its title is:

"To provide for the better protection of travelers on railroads by requiring the construction and maintenance of fences along railroad rights of way, and providing penalties for the violation of this act."

One statute confers a private right while the other creates a public right. One statute was designed for

the benefit of the individual while the other was intended for the benefit of the public: *Perrit* v. *Crouch,* 5 Bush (68 Ky.), 199. To the extent that each statute makes it the duty of the owner of a railroad to fence the tracks each treats of the same subject; but it is obvious that each is for a different purpose.

When the act of 1909 was passed the legislature knew, or must be presumed to have known, that the act of 1887 had been passed and was codified in Hill's as well as in Bellinger & Cotton's Codes and that the owners of stock were clothed with a right of action against the owner of an unfenced railroad track. While it is not necessary to determine whether the act of 1909, if it stood alone, would enable the owner to recover damages for stock killed or injured upon an unfenced railroad, it is nevertheless significant that no mention is made in the act of 1909 of the right of an individual to sue for stock killed or injured; and it is apparent that Section 5 of the act of 1909 declaring that "the provisions of this act are cumulative to existing remedies" was inserted in recognition of the existing remedies including the remedy which the act of 1887 offered to the owner of stock killed or injured upon an unfenced track.

The act of 1911 (Laws of 1911, Chapter 150) contains evidence that the lawmakers, who authorized the Railroad Commission to suspend the operation of the act of 1909, proceeded upon the assumption that the act of 1887 was still in force and did not intend that the amendment of 1911 should be permitted to interfere with the act of 1887. When the act of 1911 was passed both the statute of 1887 and the one of 1909 appeared in separate Sections of Lord's Oregon Laws. The legislature selected Section 6979, L. O. L., being Section 1 of the act of 1909, and amended it and no

other section; and when making the amendment the lawmakers clothed the Railroad Commission with authority to suspend *"this section."*

Although the act of 1887 did not in terms speak of exceptions it was judicially determined that the statute did not apply to depot grounds nor to public road crossings nor to streets of cities or villages: *Moses* v. *Southern Pac. R. Co.*, 18 Or. 385, 389 (8 L. R. A. 135, 23 Pac. 498). The act of 1909 in terms excepted depot grounds, public road crossings, cities and incorporated towns and villages laid out in lots and blocks, and federal forest reserves. In its brief and in the oral argument the defendant relied much upon the circumstance that the act of 1909 covered the same exceptions that had been judicially inserted in the act of 1887; but the whole argument of the defendant concerning this branch of the case is based upon the contention that Section 6979, L. O. L., embraces the entire statutory and case law of the state and is the sole declaration of the duty imposed upon the defendant. The only question for decision is whether Section 6979 is the sole declaration of duty imposed upon owners and operators of railroads. If this section is the only statute in force then an order suspending it necessarily suspends the only law requiring tracks to be fenced. But it is plain that both the act of 1887 and that of 1909 as amended in 1911 and in 1913 (Laws of 1913, Chapter 229) can be harmonized and can stand together without either conflicting with the other; and although both make it the duty of owners and operators of railroads to fence their tracks yet each is for a different purpose since one was designed for the benefit of the individual while the other was intended for the benefit of the public. The act of 1909 did not repeal the statute of 1887 and therefore the order

made by the Railroad Commission did not relieve the defendant from liability to the plaintiff for stock killed or injured upon the unfenced track. The order of the Railroad Commission suspended the public right mentioned in the act of 1909 but it did not affect the private right provided for in the act of 1887. The judgment appealed from is affirmed. AFFIRMED.

McBRIDE, C. J., BEAN and JOHNS, JJ., concur.

Argued June 5, reversed and suit dismissed June 18, rehearing denied July 16, 1918.

AULD v. STARBARD.

(173 Pac. 664.)

Statutes—Construction—Statutes Adopted from Other States.

1. Where a statute, after having been construed by the court of last resort in the state where the law was enacted, is adopted in Oregon, the interpretation thus given, though not binding upon the courts of Oregon, affords persuasive argument that it should be followed here.

[As to construction of adopted statutes, see note in Ann. Cas. 1917B, 651.]

Mechanics' Liens—Duplicate Statements—Statutes—Construction.

2. Laws of 1915, page 224, requiring, for the preservation of a materialman's lien, that the claimant furnish within 10 days a duplicate statement of the material to the owner is mandatory, and no lien can be established unless it is complied with.

Mechanics' Liens—Effect upon Title—Priority.

3. A laborer's or a materialman's lien is in the nature of a shadow, which ultimately may, but does not, cloud the title of or attach to the real property benefited by an improvement until the prescribed notice has been filed in the proper office within the time allowed, when the charge, which the law imposes as security, relates back to the beginning of the work, thereby giving to each claimant an equality, but not a priority of right in proportion to his respective demand as compared with the amount of the entire statutory liens.

Mechanics' Liens—Materialmen—Duplicate Statements.

4. Where plaintiff furnished material on a contract all of which was paid for and, later on the same contract, furnished other material, after the enactment of Laws of 1915, page 224, he could not have a

materialman's lien for material last furnished, in the absence of a showing that within 10 days of the time he furnished it he rendered a duplicate statement to the owner of the property.

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 2.

This is a suit to foreclose an alleged lien. The facts are that the defendants Leroy F. Straight and Hannah F., his wife, at all the times stated herein, were the owners in fee of the east 80 feet of lot 1 in Block 4 of Christian's Addition to the City of Eugene, Oregon, and on March 11, 1915, they entered into a contract with the defendant, F. S. Starbard, who stipulated to furnish the material and erect for them upon the land a two story apartment house. Starbard thereupon made an agreement with the plaintiffs, David Auld and H. C. Auld, who were partners, doing business under the name of the Mohawk Lumber Company, whereby they engaged to furnish the lumber and finishing material necessary to complete the structure. At the time the latter contract was made, a statute then in force, so far as material herein, read:

"Every * * lumber merchant * * furnishing material * * of any kind to be used in the construction * * of any building * * shall have a lien upon the same * * for the material furnished at the instance of the owner of the building * * or his agent; and every contractor * * having charge of the construction * * of any building * * shall be held to be the agent of the owner for the purposes of this Act": L. O. L., § 7416.

This section was amended February 23, 1915, by an act which took effect May 21st of that year, whereby there was added to the original a clause, which, so far as important, is as follows:

"Provided, further, that every person furnishing material of any kind to be used in the construction

* * of any building * * shall, within ten days of the time such material is delivered to any person or contractor, deliver or mail to the owner or reputed owner of the property, on, upon or about which said material is to be used, a duplicate statement of all such material delivered to any contractor or person to whom any such material has been sold or delivered, and no materialmen's lien shall be filed or enforced unless the provisions of this Act have been complied with'': Gen. Laws Or. 1915, Chap. 185.

The plaintiffs prior to June 1, 1915, furnished to Starbard, to be used in the construction of the apartment house, material for which he paid $1,165.61, and he also returned unused lumber of the value of $6.18, thereby discharging the entire indebtedness then due. Thereafter they furnished to him, to be used in the building, other material of the value of $347.10, for which no payments have been made, but they did not deliver or mail to Straight or his wife, the owners of the real property, or to any other person, a duplicate statement of any such material that had been furnished after Chap. 185, Gen. Laws Or. 1915, went into effect. In order to secure the payment of the value of material furnished subsequent to June 1, 1915, the expenses incurred, and a reasonable attorney's fee, the plaintiffs, within the time limited therefor, duly filed a notice of lien and instituted this suit for the foreclosure thereof.

A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of suit, because it was not averred in the initiatory pleading that the plaintiffs delivered or mailed to the owners of the building duplicate statements of the material which had been furnished to the contractor, was overruled. Thereupon an answer was filed alleging a failure on the part of the plaintiffs to comply with the

provisions of Chapter 185, *supra;* that the plaintiffs were paid in full for all material furnished to June 1, 1915, and that by reason of the facts so stated they are estopped to assert or enforce against the owners of the land, a lien for any part of the sum so due them.

The averments of new matter in the answer were put in issue by the reply and the cause being tried resulted in a decree as prayed for in the complaint, and Straight and his wife alone appeal.

REVERSED AND SUIT DISMISSED.

For appellants there was a brief over the name of *Messrs. Swafford & McGinnis,* with an oral argument by *Mr. Whitten Swafford.*

For respondents there was a brief and an oral argument by *Mr. Charles A. Hardy.*

MOORE, J.—Chapter 185, Gen. Laws Or. 1915, was evidently patterned after an act of the legislative assembly of the State of Washington, approved March 4, 1909 (Laws Wash. 1909, Chap. 45), and incorporated in Rem. & Bal. Code as Section 1133, the material parts of which read:

"Every person furnishing material or supplies to be used in the construction, alteration or repair of any * * building * * shall, at the time such material or supplies are delivered to any person or contractor, deliver or mail to the owner, or reputed owner, of the property, on, upon or about which said materials or supplies are to be used, a duplicate statement of all such materials or supplies delivered to any contractor or person to whom any such materials or supplies have been sold or delivered, and no materialmen's lien shall be filed or enforced unless the provisions of this act have been complied with."

By a comparison of these acts it will be seen that the only material difference between the Washington statute and that of our own, is that by the former the duplicate statement of materials is required immediately to be delivered or mailed to the owner of the premises which are being improved, while the Oregon statute allows ten days for that purpose. Prior to the enactment of Chap. 185, Gen. Laws Or. 1915, the Washington statute referred to had been construed by the Supreme Court of that state, and it was held that the requirement to deliver or mail the duplicate statement of materials furnished was mandatory, and a failure to comply therewith rendered an attempted lien invalid: *Finlay* v. *Tagholm,* 60 Wash. 539 (111 Pac. 782).

1, 2. Where a statute, after having been construed by the court of last resort in the state where the law was enacted, is adopted in Oregon, the interpretation thus given, though not binding upon the courts of this state, affords persuasive argument that it should be followed here. We conclude, therefore, that the requirements of Chap. 185, Gen. Laws Or. 1915, are prescriptive and that the provision demanding that a duplicate statement of material furnished to a contractor should be delivered or mailed to the owner or reputed owner of the real property which is being improved, must be complied with within the time limited in order to entitle the claimant to the benefits of a materialman's lien.

The decree appealed from herein is based upon the assumption that the contract for the delivery of the lumber was made prior to May 21, 1915, when the amendment of Section 7416, L. O. L., became operative; that before any alteration had thus been made in the law, the plaintiffs' contract and the material which

they had furnished in pursuance thereof, gave them an interest in the security which the statute then afforded, in the nature of a vested right, and such being the case the legislature was powerless to limit the manner of acquiring or destroying the lien which could have been secured when the agreement was made and a part of the material furnished.

In *Benbow* v. *The James Johns,* 56 Or. 554, 560 (108 Pac. 634), in speaking of the security which the statute afforded materialmen and laborers, it is said:

"The lien is created by the law, and attaches as soon as the labor or material is furnished and is not dependent on any subsequent condition, expressed or implied."

It is doubtful if the lien attaches at the time stated. In *Johnson* v. *Tucker,* 85 Or. 646, 649 (167 Pac. 787), it is believed Mr. Justice BURNETT correctly states the rule as follows:

"Although a mechanic's lien takes its origin with the furnishing of labor or materials it is not perfected until the notice or claim of lien is filed, whereupon it relates back to the beginning when the work commenced or the materials were furnished."

3. A laborer's or a materialman's lien is in the nature of a shadow, which ultimately may, but does not cloud the title of, or attach to the real property benefited by an improvement, until the prescribed notice has been filed in the proper office within the time allowed, when the charge, which the law imposes as security, relates back to the beginning of the work, thereby giving to each claimant an equality, but not a priority of right in proportion to his respective demand as compared with the amount of the entire statutory liens.

In *Steamer Gazelle* v. *Lake,* 1 Or. 119, after lumber had been furnished with which to build a steamboat,

the statute which had given a lien therefor was repealed, and it was held that the material having been delivered prior to the abrogation of the enactment, the right conferred by the law was more than inchoate, and that the obligation of the contract, as it existed when consummated, could not be impaired or destroyed by the annulment of the enactment.

In *Willamette Falls Transp. & Mill. Co.* v. *Riley,* 1 Or. 183, 185, pursuant to a contract made in June, 1853, work and labor was performed upon a building until September, 1854. On May 1st, of the latter year, however, a statute enacted in 1851, which gave a lien for such service, was repealed without any saving clause, and another law was adopted in lieu thereof. In deciding that the right to the lien continued notwithstanding the repeal, Mr. Chief Justice WILLIAMS remarks:

"When Riley commenced labor upon the buildings of said company, the law, to secure the payment of his wages, gave him a lien therefor upon said buildings, and required him, within sixty days from their completion, to file a notice of his intention to hold such lien; but before said buildings were completed, the law was repealed, and another enacted at the same time, which allowed him three months in which to file, and in which he did file, said notice. Now, as one statute ceased to exist, and the other was created *uno flatu,* we think that the act of 1854 may be regarded as a continuation of the act of 1851, so that the laborer may have that security for his hire which the law promised when he commenced work; the labor, in question, must be regarded as an entirety, and the rights of the party to the whole job be determined in accordance with the law in force at the time the contract was made, or in accordance with the law in force at the time the work was finished."

The act of the legislative assembly of the Territory of Oregon passed February 4, 1851, and referred to in

the case of *Steamer Gazelle* v. *Lake,* 1 Or. 119, made all boats built in the Territory of Oregon liable for debts contracted by the master or owner for

"work done, and supplies or materials furnished by the tradesmen, mechanics, or others for, on account of, or towards the building * * such boats or vessels, and the debts so contracted, shall be a lien on such boats or vessels": Gen. Laws Or. passed at the second session begun and held at Oregon City, December 2, 1850, p. 169, § 1.

That act contained no provision for the filing of any claim as a condition precedent to securing the lien, but required the claimant to file a verified statement of his claim against the boat or vessel with the justice of the peace of the county where the boat was, if the demand did not exceed $100, or if greater than that sum such verified statement was to be filed with the clerk of the District Court of the proper county, whereupon a warrant of attachment was issued and the boat or vessel seized by the sheriff or constable: Id., § 2.

As no claim of lien was required to be filed at that time in respect to such class of property, it was properly held in the case last cited that the lien thus recognized was not inchoate, but became vested upon the delivery of the lumber which was used in building the steamboat. Under enactments like those at present in force in Oregon, it is believed however, that the right to a statutory lien is only inchoate, and that the lien does not become vested until the notice or claim has been filed, as required by law: Bloom, Mechanics' Liens, § 416; 27 Cyc. 110; 18 R. C. L. 946. It will be seen that the decision rendered in *Steamer Gazelle* v. *Lake, supra,* which is cited and relied upon by plaintiffs' counsel, is not controlling herein.

The final conclusion reached in the case of *Willamette Falls Transp. & Mill. Co.* v. *Riley,* 1 Or. 183, which is also invoked as sustaining the theory of plaintiffs' counsel, can be of little value since it was there held that the claimant's right to enforce his lien might be worked out in accordance with the law of 1851, which was in force when the contract was made, or that the suit to foreclose the lien might proceed in conformity with the provisions of the act of 1854, which was in force when the work was finished.

In *Weaver* v. *Sells,* 10 Kan. 609, a claimant who had sold and delivered lumber which was used in the construction of a building, filed a claim of lien for the value of the material so supplied. The statute giving the lien was repealed without excepting any causes from its operation. In deciding that case it was held that a lien for material became vested when the lumber was furnished, and that it was not within the power of the legislature afterward to destroy the right, by repealing the statute under which the right accrued. In that case as the filing of the notice was essential to the preservation of the lien, we do not think the right became vested until the claim was filed.

A text-writer in discussing this subject remarks:

"Some courts hold that a mechanic's lien is a vested right, which the legislature cannot take away after it has once accrued; but the better reason and an equal weight of authority sustain the doctrine that the lien pertains merely to the remedy, and may therefore be taken away by the legislature that created it": Boisot, Mechanics' Liens, § 33.

Another author observes:

"Where a contract was made and materials were furnished while a certain lien law was in force, but the notice of lien was not filed in the recorder's office until

after a subsequent lien law went into effect, the court held that the lien was not lost, but that it must be enforced in accordance with the provisions of the latter act. In the second act there was a saving clause. 'Nothing contained in this act shall be deemed to apply to or affect any lien heretofore acquired.' Until the claim was filed there was simply a right to a lien, and the lien had not yet been 'acquired' (although this point was not specially noticed in the case referred to); yet the court held that 'after the new statute went into effect, all subsequent acts and proceedings relating to the lien or its enforcement were governed by, and must have been in accordance with, its provisions' ": Bloom, Mechanics' Liens, § 36.

4. Whether or not the legislative assembly, by amending Section 7416, L. O. L., could take away an inchoate right to a lien, after a contract had been made and a part of the material furnished, is not necessary to a decision herein, for Chap. 185, Gen. Laws Or. 1915, does not attempt to abrogate or abridge such right, but only to add another requirement for the benefit of the owner of the premises, that he shall be notified by a duplicate statement delivered or mailed to him of the materials furnished for the improvement of his property, when the betterment is being made by a contractor. Nor is it essential to consider whether or not such amendment is retroactive, for all the material furnished by the plaintiffs to Starbard prior to May 21, 1915, to be used in the construction of the building had been fully paid for before the claim of lien was filed.

The right to the lien not being vested when the amendment was enacted, such statute pertained only to the remedy, and this being so the alleged lien must fail for want of delivering or mailing to the owners of the real property duplicate statements of the ma-

terials furnished after June 1, 1915. It follows from these considerations that the decree is reversed and the suit dismissed. REVERSED AND SUIT DISMISSED. REHEARING DENIED.

McBRIDE, C. J., BEAN and JOHNS, JJ., concur.

Argued June 5, reversed and suit dismissed June 18, rehearing denied July 16, 1918.

QUACKENBUSH *v.* STRAIGHT.

(173 Pac. 667.)

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 2.

For appellants there was a brief over the names of *Mr. Whitten Swafford* and *Mr. Charles E. McGinnis,* with an oral argument by *Mr. Swafford.*

For respondents there was a brief over the names of *Messrs. Hewitt & Dillard* and *Mr. Charles A. Hardy,* with an oral argument by *Mr. Hardy.*

MOORE, J.—This is a suit to foreclose an alleged lien. The material facts are identical with a statement thereof, as set forth in the case of *Auld* v. *Starbard,* decided to-day, except that the plaintiffs herein, pursuant to a contract made with the defendant F. S. Starbard, sold and delivered to him hardware to be used in erecting a building at Eugene, Oregon, for the defendants Leroy F. Straight and Hannah, his wife; that the value of such material which was so furnished prior to May 21, 1915, when Chap. 185, Gen. Laws Or. 1915, went into effect was fully paid; that thereafter the plaintiffs furnished other material to Starbard of the value of $149.95, but they did not deliver or mail to

Straight or his wife any duplicate statements of the hardware so sold and delivered to the contractor; that no payments having been made on account of the material supplied after June 1, 1915, a lien to secure the payment of the sum so due was filed, and a suit instituted for the foreclosure thereof; that the suit terminated in a decree for the plaintiffs herein granting the relief prayed for in the complaint, and the defendants Straight and wife alone appeal.

The conclusion reached in the Auld case is controlling herein, and such being the case the decree rendered in this cause is reversed and the suit dismissed.

REVERSED AND SUIT DISMISSED.

McBRIDE, C. J., BEAN and JOHNS, JJ., concur.

Argued June 25, reversed and indictment dismissed July 16, 1918.

STATE v. ANDREWS.*

(173 Pac. 1173.)

Larceny—Larceny by Bailee—Failure to Deliver Note—Statute.

1. Where defendant, husband of part owner of ranch sold, intrusted with note, payable to his wife and other owner, for delivery, after indorsement by payees, to agent who negotiated sale in payment of commission, at direction of his wife, she having indorsed, sold note and accounted to her for proceeds, he did not violate Section 1956, L. O. L., denouncing larceny by bailee.

[As to what constitutes larceny, see notes in 57 Am. Dec. 271; 88 Am. St. Rep. 559.]

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2.

Defendant Crayton S. Andrews was indicted, tried and convicted of the crime of larceny by bailee, and appeals.

*Authorities discussing the question of larceny or embezzlement by one spouse of other's property are collated in a note in 29 L. R. A. (N. S.) 830. REPORTER.

By the indictment, the defendant is charged with having on March 26, 1915, in the county of Multnomah and State of Oregon, then and there being, and then and there being the bailee of a certain promissory note dated on the twenty-sixth day of January, A. D. 1915, signed by H. L. Price and S. Anna Price, and for the sum of seventeen hundred twenty-seven and fifty one-hundredths dollars ($1727.50) and made payable to the order of C. L. Look and L. M. Andrews of the value of seventeen hundred and twenty-seven and fifty one-hundredths dollars ($1727.50) and the personal property of the said C. L. Look and L. M. Andrews and as such bailee aforesaid, did then and there feloniously embezzle and unlawfully and wrongfully convert the said promissory note to his, the said Crayton S. Andrews' own use, and did then and there unlawfully and feloniously fail, neglect and refuse to deliver, keep or account for the said property according to the nature of his trust, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

REVERSED AND INDICTMENT DISMISSED.

For appellant there was a brief and an oral argument by *Mr. Ralph R. Duniway.*

For the State there was a brief over the names of *Mr. Walter H. Evans,* District Attorney, and *Mr. John Collier,* Deputy District Attorney, with an oral argument by *Mr. Collier.*

BEAN, J.—1. The first assignment of error for consideration is the refusal of the court to direct the jury to find a verdict of not guilty, upon motion of defendant's counsel made at the close of the state's case in chief. A similar motion was made in behalf of de-

fendant upon the opening statement of the district attorney. This motion was renewed at the close of all of the testimony. It was claimed by the prosecution that the defendant had failed to keep or account for the promissory note described in the indictment according to the nature of the trust imposed upon him when he received the note for delivery to one Sam Hewey. The facts in the case leading up to and surrounding the bailment of said note with the defendant and its subsequent alleged conversion by him may be stated as follows: In June, 1914, the defendant, Crayton S. Andrews, as the owner of a ranch situated in Wasco County, Oregon, listed the property for sale with the realty department of Hartman & Thompson, bankers, in the City of Portland, Oregon. The price then asked for said ranch was $44,800, the purchaser to assume the payment of mortgages thereon, amounting to about $19,580. While the defendant represented to Mr. Sam Hewey, an agent working on a commission basis for Hartman & Thompson, that he, Andrews, was the owner of said property; it was in fact owned by C. L. Look, of The Dalles, Oregon, and his sister, L. M. Andrews, the wife of the defendant. In November or December of the same year the defendant, Andrews, orally agreed with Sam Hewey to give him one half of all above the sum of $20,000 that he could get for the ranch. In the first few days of January, 1915, a Mr. H. L. Price, who subsequently purchased the property, called to see Mr. Hewey about purchasing a good ranch, and on January 4, 1915, went with Mr. Hewey to see the ranch in Wasco County. They returned to Portland in the forenoon of January 5th. That evening Sam Hewey sent to the defendant at Los Angeles, California, a night letter, stating that he had a prospective buyer for the ranch and asking defend-

ant to wire if he would confirm his offer as to commission, buyer to assume mortgages. Defendant answered that he would do so, and hoped Hewey would make five thousand ($5,000) dollars out of it. On January 7th, Hewey wired defendant as follows:

"Your telegram received. I sold your ranch including stock, implements, and Clarence lease on Kelly place. Price above twenty-five thousand. Have two hundred fifty dollar deposit. Twenty-five hundred to be paid in twenty days, seventy-two hundred fifty in thirty days. Buyer to assume sixteen thousand one hundred twenty-five mortgages, you to square up with Kelly—wire when can come, meet me at Stelwyn Apts."

Defendant Andrews answered that he would meet Hewey on the next Monday as requested. On January 6th, Hewey as agent signed an option agreement with one H. L. Price to sell the land and personal property thereon for $29,580. Defendant met Hewey on January 11, 1915, and after discussing the details concerning the sale and the commission earned by Hewey, and making figures in regard thereto, defendant signed the following agreement:

"I hereby agree to pay Sam Hewey three thousand ten and 50/100 dollars as extra commission above the regular 2½% on the $29,580—sale of my wheat ranch. Regular commission amounts to $739.50."

The negotiations between Mr. Price and the owners of the property continued until February 24th, when the agreed purchase price was paid and deeds were delivered to Price. A note was first prepared to be executed by Price in favor of Sam Hewey, for the sum of $1,727.50, but in order that the purchaser might not know in regard to this amount of commission being paid, the note was changed so as to make C. L. Look

and L. M. Andrews the payees of the note, with the understanding that the note should be indorsed without recourse to Hewey. The note was executed by Price and wife at The Dalles, and indorsed by C. L. Look and sent to Crayton S. Andrews at Portland to have it indorsed by Mrs. Andrews, and it is claimed the note was to have been delivered to Hewey. Part of the commission, $1,272.50, besides the regular commission of 2½ per cent amounting to $739.50, paid to Hartman & Thompson, was received by Hewey. Thereafter in an action which was pending upon appeal to this court when this cause was tried, Hewey obtained a judgment against C. S. Andrews for $1,727.50, the balance of the amount agreed to be paid as commission: See *Hewey* v. *Andrews,* 82 Or. 448 (159 Pac. 1149, 161 Pac. 108).

The evidence on the part of the state tended to show further that Mrs. L. M. Andrews indorsed the note in question, together with one for $863.75, payable to her and delivered them to her husband, the defendant, who sold the two notes to C. J. Broughton of Dayton, Washington, and accounted to his wife for the same. There was no attempt on the part of the prosecution to show that the defendant violated any instruction of either C. L. Look or L. M. Andrews, the owners of the note, as alleged in the indictment, or that he failed to account to either of them for the note according to the nature of his trust.

The state's theory of the case was that the agreement between the interested parties concerning the note was in substance a contract of bailment by the terms of which the equitable title to the note vested in Sam Hewey.

Plainly stated, the evidence indicated that Crayton S. Andrews employed Sam Hewey to sell 1,280 acres

of land, and agreed to pay him an extra commission if he made the sale; one half of all over $20,000 that might be realized for the land; nothing was to be paid Hewey until the sale was completed. The farm was sold by Hewey for more than the $20,000. It was sold with some personal property, and a subsequent agreement in writing was made whereby Andrews promised to pay Hewey $310.50 in addition to the regular commission of 2½ per cent that was to be paid to Hartman & Thompson by whom Hewey was employed. Before the deal was closed, there was some disagreement as to the distribution of the cash between defendant and his brother-in-law Clarence L. Look, and a written agreement adjusting the matter of the proceeds of the ranch was executed by C. L. Look, E. M. Look and Lillie M. Andrews, wife of defendant, and witnessed by defendant, in which it was stated:

"We pay Hewey one half of the chattel mortgage of $3,455; this note will be $1,727.50, then pay him his balance due in cash $1272.50, making a total of $3,000 for his commission."

It is clear that there was an agreement to pay Hewey $3,000, or a note of $1,727.50, and $1,272.50 cash. This was all the transaction amounted to. The $1,272.50 was paid to Hewey. The defendant failed to pay his creditor Hewey the note or its equivalent. This was not larceny nor a conversion, nor embezzlement, but a mere breach of contract: McClain on Criminal Law, Vol. 1, § 639; Bishop on Criminal Law, Vol. 1, § 582. The title to the note never passed to Hewey so that the same would be the subject of larceny from him. The prosecution recognized this and alleged the ownership of the note to be in C. L. Look and L. M. Andrews. There was a total lack of any evidence to show that the note was intrusted to defend-

ant with directions from C. L. Look or L. M. Andrews to deliver the same to Hewey. At the most, there was only an agreement to so dispose of the note. On the other hand, Mrs. L. M. Andrews, the wife of defendant, testified that after the note had been indorsed by C. L. Look who claimed no interest in the note, she indorsed and gave it to the defendant with instructions to sell the same, with another note, and that he accounted to her for such sale. Mrs. L. M. Andrews being the owner of the note had the right to do with it as she pleased: See 2 Bouvier's Law Dictionary for definition of "owner," p. 565; 6 Words and Phrases, 5134. She, therefore, had the right to authorize her husband to sell the note. It was claimed by defendant that the *irregular* commission was to be divided "fifty fifty" between himself and Hewey.

In order to show a violation of Section 1956, L. O. L., it was necessary for the state to show that the rights of the legal owner of the note had been invaded to some extent, or that there had been a felonious conversion of the note to the defendant's own use: *State* v. *Skinner*, 29 Or. 599, 600 (46 Pac. 368); *State* v. *Lucas*, 24 Or. 168 (33 Pac. 538).

The state having failed to produce such proof, it was error to refuse to direct the jury to find the defendant not guilty. The judgment of the lower court is therefore reversed, and the indictment dismissed.

REVERSED AND INDICTMENT DISMISSED.

McBRIDE, C. J., HARRIS and JOHNS, JJ., concur.

Motion to dissolve injunction argued November 27, denied December, 1916, submitted on briefs July 9, affirmed July 16, 1918.

MALAGAMBA *v.* McLEAN.*

(161 Pac. 560; 173 Pac. 1177.)

Injunction—Temporary Injunction—Motion.

1. In a suit to enjoin the sale of real estate and apply the equitable interest which plaintiff's judgment debtor has in the property, owned by his wife, in which a temporary injunction was granted on appeal, where a dissolution of the restraining order would enable the owner to dispose of the lot, and to determine on the restraining order whether the complaint states a cause of suit would be to decide the main question involved, a motion to dissolve the injunction on that ground will be denied.

ON THE MERITS.

Fraudulent Conveyances—Husband and Wife.

2. A creditor of the husband could not have a house and lot in the wife's name, the house having been built with the husband's money, subjected to his debt, in the absence of showing the husband's financial condition when he made the present of the house, or that it was done in fraud of existing creditors.

[As to transfers of real estate between husband and wife, and validity of same when there are creditors, see notes in 19 **Am. St. Rep.** 657; 20 **Am. St. Rep.** 715; 90 **Am. St. Rep.** 497.]

From Clatsop: JAMES A. EAKIN, Judge.

Department 2.

On motion to dissolve a temporary injunction issued by the Supreme Court. Motion Denied.

Messrs. A. C. & G. C. Fulton, for the motion.

Messrs. Norblad & Hesse, contra.

HARRIS, J.—1. Irena C. McLean and Arch McLean are husband and wife. Arch McLean and D. Malagamba were partners doing business under the firm name of Arch McLean & Company. Irena C. Mc-

*On the question of transactions between husband and wife, as fraud on creditors, see note in 32 **L. R. A.** 67. REPORTER.

Lean obtained a judgment against the partners for $2,795.91 together with interest and costs. Malagamba commenced a suit which terminated in a decree dissolving the partnership and a judgment against Arch McLean for $1,850.80 together with other sums. The judgment obtained by Irena C. McLean was prior to the one secured by Malagamba. The partnership being without assets Irena C. McLean caused the issuance of an execution and a levy on the individual property of Malagamba. Arch McLean is insolvent and consequently Malagamba is unable to enforce the satisfaction of his judgment by execution, levy and sale. Irena C. McLean owns lot 5 in block 46, McClure's Addition to Astoria. A building was constructed upon that lot. Claiming that the building had been erected by Arch McLean and paid for by him and that therefore he had an equitable interest in the property, Malagamba commenced this suit against the McLeans and the sheriff to stay the progress of the execution issued on the Irena C. McLean judgment and to compel her to apply on her judgment the value of the alleged equitable interest ascribed to Arch McLean.

The defendants demurred to the complaint filed by Malagamba and the Circuit Court ruled that the pleading did not contain facts sufficient to constitute a cause of suit; and, the plaintiff refusing to plead further, the court dismissed the suit. Malagamba appealed and upon his application we issued an order which, pending the appeal, and until a final hearing, stays the execution on the Irena C. McLean judgment and enjoins the sale of lot 5. The defendants contend that the complaint does not state facts sufficient to constitute a cause of suit and they therefore moved for a dissolution of the restraining order.

The very purpose of this suit is to apply whatever equitable interest Arch McLean may have in lot 5, on the judgment held by Irena C. McLean, and it is apparent that a dissolution of the restraining order would enable the McLeans to dispose of lot 5 before the cause can be heard on the merits. To determine, on this motion to dissolve the restraining order, whether the complaint states a cause of suit would be to decide the main question involved in the controversy. For aught that appears in the record, the appeal is presented in good faith and under all the circumstances we prefer to continue the *status quo* until the final hearing and at that time determine the merits of the litigation. The motion to dissolve the injunction is denied.

MOTION DENIED.

MOORE, C. J., BURNETT and BEAN, JJ., concur.

Submitted on briefs July 9, affirmed July 16, 1918.

ON THE MERITS.

(173 Pac. 1177.)

In Banc.

This is a creditor's suit. The substance of the complaint is to the effect that plaintiff and defendant Arch McLean were at one time partners in a shoe store; that in a suit for a dissolution of the partnership and an accounting, plaintiff obtained a decree, *inter alia*, for the recovery of certain sums of money; that while such suit was pending, the defendant Irena C. McLean obtained a joint and several judgment against the partnership for a sum of money upon which there is now due $2,669, with interest; that defendant Arch McLean has practically no money or property whereby

plaintiff's decree for money may be satisfied; that defendant Irena McLean is the owner of a certain lot of land in Astoria, upon which, at some time in the past, the defendant's husband erected a two-story house at an expense of about $3,500, which enhanced the value of the wife's property to that extent, and that she has never repaid the husband for such expenditure. It is further alleged that the wife refuses to enforce her joint and several judgment against her husband but is seeking to collect it all from the plaintiff; that the husband refuses to enforce his claim for the debt incurred in building the house on his wife's land, all for the purpose of defrauding plaintiff. The prayer asks that the wife's indebtedness to the husband be ascertained and the amount thereof be applied as a setoff to her judgment against the plaintiff and the defendant Arch McLean and that any surplus thereof be applied upon plaintiff's judgment against Arch McLean. A demurrer to the complaint was sustained and plaintiff appeals. AFFIRMED.

For appellant there was a brief submitted over the name of *Mr. J. J. Barrett.*

For respondents there was a brief prepared and submitted over the name of *Messrs. George C. & A. C. Fulton.*

BENSON, J.—2. There is but one question to be answered, which is:

Does the complaint state a sufficient cause of suit as against the defendant Irena C. McLean? The allegations of fact upon which the right of setoff is based, are found in paragraph 9 of the complaint, which reads thus:

"That at some time in the past, the exact time of which is unknown to this plaintiff, the defendant Arch McLean, built, and caused to be built, upon defendant Irena C. McLean's real property, to-wit:—upon Lot 5, Block 46, McClures Addition to Astoria, Clatsop County, Oregon, a two story house, at an expense of about $3,500.00, as plaintiff is informed, and that the value of defendant Irena C. McLean's said real property was thereby enhanced in at least said amount, that defendant Irena C. McLean never repaid defendant Arch McLean for the sum, or sums of money so expended by him in building, or causing to be built said house and said improvements upon her said real property. That defendant Irena C. McLean is now indebted to defendant Arch McLean in about the sum of $3,500.00 for such house so built, and such improvements so made by defendant Arch McLean upon her said real property, but that defendant Arch McLean on account of plaintiff's said unsatisfied judgment and decree against him, refuses to enforce his claim for said amount against his said wife, defendant Irena C. McLean, all for the purpose of defrauding this plaintiff and to prevent him from collecting his said judgment and decree. That defendant Arch McLean's said claim against his wife, Irena C. McLean, defendant herein, for such money so spent by him in building said house and making improvements upon defendant Irena C. McLean's said real property, ever since has been and now is an existing and enforceable claim against defendant Irena C. McLean, but is not reachable by writ of execution upon plaintiff's said judgment and decree against defendant Arch McLean."

When these averments are stripped to the essentials, they amount to this: at some time in the past, defendant Arch McLean built a two-story house on his wife's lot, at an expense of about $3,500. Nothing is said of the financial condition of the husband at that time, nothing of any agreement between him and his wife as to the motive of the action, nothing of any promise upon her part to reimburse him for his expenditure.

So far as disclosed by the record, he may have been quite prosperous at the time and abundantly able to make a gift to the wife of the building, and may have so intended. In any event, it would be necessary for the plaintiff to allege and prove that there was an agreement to repay the money, or that the expenditures were made in fraud of existing creditors. This has not been done and the demurrer was properly sustained. The decree is affirmed. AFFIRMED.

Submitted on briefs July 9, affirmed July 16, 1918.

MALAGAMBA *v.* McLEAN.*

(173 Pac. 1175.)

(See, also, 161 Pac. 560; 173 Pac. 1177.)

Execution—Interest of Heirs.

1. The share of an heir in real property is subject to execution upon a judgment against the heir, even prior to final distribution of the estate.

Executors and Administrators—Interest in Realty.

2. In the absence of a showing that there is some necessity for his interference, for some purpose of administration recognized by statute, an administrator has nothing to do with the real estate, and it is the absolute property of the heir.

[As to actions by heirs to recover possession of property before distribution in probate, see note in 23 Am. Dec. 200.]

Injunction—Existence of Other Remedy.

3. The creditor of an heir was not entitled to mandatory injunction, requiring application of the heir's share in the estate to his debt, in the absence of allegation that the sale of the share in the estate would not be ample to satisfy the execution on his judgment.

From Clatsop: JAMES A. EAKIN, Judge.

In Banc.

This is a creditor's suit in which the complaint alleges that plaintiff and defendant, Arch McLean, were

*On general equitable jurisdiction against judgment where there is a remedy at law, see note in 32 L. R. A. 326. REPORTER.

formerly partners conducting a shoe store in Astoria: that plaintiff began a suit for an accounting and dissolution of the partnership, in which he prevailed, obtaining a decree, *inter alia,* for sums of money amounting in all, to about $3,000. The pleading continues as follows:

"IV.

"That thereafter, to-wit: on the 25th day of September, 1916 plaintiff D. Malagamba caused to be issued by the Clerk of the Circuit Court of Clatsop County, a writ of execution in said cause, and on said judgment and decree in his favor, which said writ of execution was thereafter, to-wit:—on the —— day of September, 1916, levied by the Sheriff of Clatsop County upon lot 18, Block 4 of Flavel Center, according to the duly recorded map and plat thereof, all in Clatsop County, State of Oregon. That the value of said real property of defendant Arch McLean, so levied upon as aforesaid, does not exceed the sum of $25.00 that defendant Irena C. McLean's said judgment is a prior lien thereon, and that the proceeds which will be realized upon a judicial sale thereof will be wholly and entirely insufficient to satisfy plaintiff's said judgment and decree in full. That defendant Arch McLean has no other property, personal or real, subject or reachable to or by a writ of execution, and that said judgment and decree in favor of said plaintiff remains, for the foregoing reasons, wholly and entirely unsatisfied.

"V.

"That heretofore, to-wit:—on or about May 24th, 1894, George McLean, father of defendant Arch McLean, died intestate and that thereafter, to-wit:—on or about June 26th, 1894, defendant Elizabeth McLean, as his surviving widow, upon her written application, was duly appointed by the County Court of the State of Oregon, for the County of Clatsop, as the administratrix of the estate of George McLean, deceased, thereafter duly qualified, and ever since has been and now is the duly appointed, qualified and act-

ing administratrix of the estate of George McLean, deceased. That said George McLean, deceased, left an estate consisting of personal property and real property in the County of Clatsop, and that at the time of his death, the said George McLean was the owner in fee simple of the following real property situated in the County of Clatsop, and State of Oregon, and more particularly described as follows, to-wit:

"Lot 8, Block 64, Lot 2 Block 73 and Lot 1 Block 146, all in the town of Astoria, as laid out by John McClure and as extended by Cyrus Olney. That said George McLean left surviving him, as heirs at law, Duncan A. McLean, a son, Robert W. McLean, a son, defendant Arch McLean, a son, Sarah Ann McLean, a daughter, Elizabeth McLean, a daughter, and defendant Elizabeth McLean, his widow, and that defendant Arch McLean, ever since the death of said George McLean, his father, has been and now is entitled to an undivided one-fifth interest in the aforedescribed real property as his share of the estate of said George McLean, deceased, subject only to the costs and charges of administration of said estate. That there is no report on file in said estate of George McLean, deceased, and no report was filed, by defendant Elizabeth McLean as such administratrix of said estate of George McLean, deceased, showing how much of the personal property of said deceased was reduced to money, and how much of the outstanding money of said George McLean, deceased, was collected, or what claims were filed against said estate, or what amount of money was disbursed for claims, expenses or charges of administration, and that said estate of said George McLean, deceased, has never been administered upon, and has not been closed, and defendant Elizabeth McLean has not been discharged as administratrix of the estate of George McLean, deceased, neither has defendant Arch McLean's share to the one-tenth part in the personal property, or to the one-fifth part of the real property of said George McLean, deceased, been distributed or set aside to him, and that for the foregoing reasons, defendant Arch McLean's interest as heir at law of George McLean, deceased, to a one-tenth interest in the personal prop-

erty of said deceased, and to a one-fifth interest in the real property of said deceased, after deduction of the costs and charges of administration and claims against said deceased, are not reachable by a writ of execution.

"VI.

"That after said George McLean had so died intestate as aforesaid, Elizabeth McLean, one of the daughters and heirs at law, and who was likewise as such heir at law of said George McLean, deceased, entitled to a one-tenth interest in the personal property and to a one-fifth interest in the aforedescribed real property of said George McLean, deceased, after deduction of charges and expenses of administration, and claims against said deceased, at a time unknown to this plaintiff, but before January 1st, 1913, died intestate, and, as plaintiff is informed, unmarried and without leaving any lineal heirs or descendants. That the estate of said Elizabeth McLean, has never been administered upon, as this plaintiff is informed, and that defendant Arch McLean, as her brother and one of her heirs at law, inherited of said Elizabeth McLean, deceased, one-fifth part of all her right, title, interest and claim as heir at law to the estate of George McLean, deceased, the said Elizabeth McLean having died leaving surviving her, her brother Duncan McLean, Robert W. McLean, Arch McLean, her sister Sarah Ann McLean, and her mother Elizabeth McLean. That the interest and property inherited by defendant Arch McLean from his sister Elizabeth McLean, deceased, has never been distributed or set aside to him, and is therefore not reachable by execution.

"VII.

"That defendant Arch McLean, as plaintiff is informed and verily believes, is the owner and holder of life insurance policies, or other policies of insurance, or interest therein, the exact amount of which is unknown to this plaintiff, and which are not reachable by execution, and that defendant Arch McLean is the owner and holder of other valuable rights,

equities, claims and outstanding accounts, interests and other choses in action, the exact nature of which is to this plaintiff unknown at the present time, and which are not reachable by writ of execution, and which defendant Arch McLean refuses to apply toward payment of plaintiff's said judgment and decree against him.

"That defendant Arch McLean is wholly insolvent and has no property, real or personal, subject or reachable by writ of execution upon plaintiff's said judgment and decree, and that unless defendant Arch McLean is by this Honorable Court enjoined and restrained from selling, trading, exchanging, bartering, quit-claiming, giving away and encumbrancing, mortgaging, relinquishing or otherwise disposing of his said interest as heir at law in and to the estate of said George McLean, deceased, and in and to the estate of said Elizabeth McLean, deceased, and unless defendant Elizabeth McLean, as administratrix of the estate of George McLean, deceased, is by this Honorable Court enjoined and restrained from distributing and setting aside to defendant Arch McLean, his said interest as heir at law in and to the estate of said George McLean, deceased, plaintiff will suffer irreparable loss and damage and will be prevented from collecting his said judgment and decree against defendant Arch McLean. That plaintiff has no plain, speedy or adequate remedy at law, or at all, in the premises."

The prayer is for temporary restraining orders and a mandatory injunction compelling Arch McLean to apply his interests as heir of the two estates to the payment of plaintiff's judgment.

The trial court sustained a demurrer to the complaint, and plaintiff declining to plead over, a decree was entered dismissing the suit and plaintiff appeals.

AFFIRMED.

For appellant there was a brief submitted by *Mr. J. J. Barrett.*

For respondents there was a brief submitted over the name of *Messrs. George C. & A. C. Fulton.*

BENSON, J.—1–3. This suit is based upon the theory that the real property of an estate is not subject to execution upon a judgment against the heir, until after final distribution of the estate; but such a conclusion is clearly erroneous. In the case of *Clark* v. *Bundy*, 29 Or. 190 (44 Pac. 282), Mr. Justice WOLVERTON presents an interesting discussion of the relation of the administrator to the real property of a decedent, from which it appears that in the absence of a showing that there is some necessity for his interference, for some purpose of administration recognized by statute, he has nothing to do with it, and it is the absolute property of the heir. In the case at bar there is no hint of any condition of affairs in the estate of George McLean, deceased, which would justify the administratrix in exercising any control over the real property, and so far as the record discloses, the lien of plaintiff's judgment attached to Arch McLean's interest in the land at the time when it was docketed. He might at any time thereafter have had an execution levied thereon, and there is nothing in the complaint to show that its sale would not be ample to satisfy the decree.

"A cardinal rule of equity jurisprudence particularly applicable to this class of cases is that a court of equity will not aid a complainant where there is an adequate remedy at law": 12 Cyc. 5; *Dawson* v. *Sims*, 14 Or. 561 (13 Pac. 506).

The plaintiff has not made a showing that his legal remedy is inadequate, and the demurrer was properly sustained. The decree of the lower court is affirmed.

AFFIRMED.

Argued at Pendleton May 6, affirmed May 28, rehearing denied July 23, 1918.

STATE *v.* CHONG BEN.*

(173 Pac. 258, 1173.)

Criminal Law—Indeterminate Sentence—Construction of Statute.

1. Laws of 1917, Chapter 302, Section 17, providing that Laws of 1911, Chapter 127, Sections 6–8, 14–17, dealing with the giving of indeterminate sentences and amended by the act of 1917, shall remain in effect in certain specified cases, *held* to preserve the operation of original sections as to crime committed before act of 1917 went into effect.

Statutes—Subjects and Titles of Acts—Paroles.

2. Under Article IV, Section 20, of the Constitution, providing that an act shall embrace but one subject, which shall be expressed in title, Laws of 1917, Chapter 302, Section 17, is void in so far as it limits parole by court, the act relating to executive paroles and its title making no mention of Laws of 1911, Chapter 108, of which such Section 17 would be an amendment.

Criminal Law—Repeal of Statute by Implication.

3. The repeal of statutes by implication is not favored.

Homicide—Assault to Kill—Sufficiency of Evidence.

4. Evidence *held* to sustain conviction for assault with intent to kill.

Homicide—Conspiracy—Question for Jury.

5. In a prosecution against three defendants for assault with intent to kill, evidence of conspiracy *held* sufficient to justify submission to jury of question of whether there was a conspiracy to kill.

[What constitutes conspiracy and what evidence is necessary to prove it, see note in 3 **Am. St. Rep.** 474.]

Homicide—Instructions—Evidence.

6. In a prosecution against three defendants for assault with intent to kill, where there was sufficient evidence to justify submission of conspiracy to jury, the giving of instructions as to conspiracy was not error.

Criminal Law—Conspiracy—Instruction—Province of Jury.

7. An instruction that, where two or more persons are associated together for purpose of doing an unlawful act, the act of one is deemed act of all is not objectionable, as invading province of jury by assuming existence of conspiracy.

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*For a discussion of the question of homicide in carrying out unlawful conspiracy, see comprehensive note in 68 **L. R. A.** 193.

REPORTER.

ON PETITION FOR REHEARING.

Criminal Law—Instructions—Acts and Declarations of Conspirators.

8. An instruction that, where two or more persons are associated together for purpose of doing an unlawful act, the act or declaration of one while engaged in or pursuant to the common object or design is the act or declaration of all, for which all are liable, does not permit jury to use acts and declarations of one against all defendants regardless of proof of conspiracy or whether proof of conspiracy existed at the time of the act or declaration and does not permit proof of conspiracy as to all by evidence of acts and declarations of one.

Criminal Law—Further Instruction—Necessity for Request.

9. Where no request was made, court may assume that instruction further than that given was not desired, where instruction, although proper, could have been deduced from a given instruction.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

The defendants were indicted and convicted of the crime of assault with intent to kill one Eng Chong, were sentenced by the court to serve an indeterminate sentence of from one to ten years in the penitentiary, and being dissatisfied with the judgment of the court, took this appeal.

The alleged offense was committed, if at all, on February 16, 1917. The indictment was returned on June 9, 1917, and final judgment was pronounced July 5, 1917.

At the time the alleged offense was committed, Section 1592, L. O. L., as amended by Section 7 of Chap. 127, Laws of 1911, was as follows:

"Section 1592. Whenever any person is convicted of a crime for which the maximum punishment is a definite term of years in the penitentiary the court shall, unless it impose other sentence than a sentence to serve a term in the penitentiary, sentence such person to imprisonment in the penitentiary without limitation of time, stating in such judgment and sentence the minimum and maximum penitentiary penalty for

such crime, as provided by law, which said sentence shall be known as an indeterminate sentence."

Section 1724, L. O. L., as amended in 1911, was as follows:

"Section 1724. Any person sentenced to serve an indeterminate sentence in the penitentiary may be paroled by the Governor upon his own motion, or upon recommendation of the Parole Board, at any time after the said person has served the minimum term in the penitentiary prescribed by law for the crime for which said person was convicted and sentenced; said parole may be upon such terms and conditions as shall seem to the Governor to be just or expedient."

Section 1586, L. O. L., as amended by Chap. 108, Laws of 1911, was as follows:

"Section 1586. When any person who has not previously been convicted of a felony shall have been convicted in the circuit court of this State of any felony or misdemeanor, and sentenced not to exceed ten years' imprisonment in the penitentiary, with or without fine, and sentence shall have been pronounced, the court before which the conviction shall have been had, if satisfied that such person, if permitted to go at large, would not again violate the law, may, in its discretion, by order of record, parole such person and permit him or her to go and remain at large under the supervision of the court, or under the supervision of any prisoners' aid society now organized or hereafter to be organized under the laws of the State of Oregon, subject always, however, to the order of such court as such court may deem best until such parole shall be terminated as hereinafter provided, but such court shall have no power to parole any person after he or she has been delivered to the warden of the penitentiary, or where it shall be made to appear to said court before such parole shall have been granted that such person has been before convicted of a felony."

The legislature in 1917 passed an act amending certain sections of the parole law, abolishing or purporting to abolish all minimum punishments for crime before prescribed by law, and providing that the court should in all cases pronounce an indeterminate sentence, whose maximum should not be greater than the highest punishment prescribed by existing laws, and whose minimum should not exceed one half the maximum penalty provided. Section 16 of the act provided that no person should be paroled under the act until he had served the minimum penitentiary sentence ordered by the court.

Section 17 provides that nothing in the act should impair the power of the court to parole under Section 1586, L. O. L., as amended in 1911, except that no convicted prisoner should have the right to a parole after instituting an appeal to the Supreme Court.

Section 14 of the act of 1917, *supra,* is as follows:

"Sec. 14. Notwithstanding the amendment hereby of Sections 6, 7, 8, 14, 15, 16 and 17 of Chapter 127 of the General Laws of Oregon for 1911, and the substitution of new provisions therefor, the provisions of said Chapter 127 of the General Laws of Oregon for 1911 shall apply to all persons now confined in the penitentiary or sentenced to confinement in the penitentiary, and to all persons hereafter confined in the penitentiary or sentenced to confinement in the penitentiary hereafter, for all felonies committed prior to the time that this amendatory Act takes effect, when such persons have served the minimum penitentiary sentence heretofore fixed by law as penalty for the crimes whereof they have been convicted, and the said original sections shall continue in force and effect for the purpose of sentencing all such persons to confinement in the penitentiary for felonies committed prior to the taking effect of this Act. And the judge of any court shall, upon request by the secretary of

the Parole Board, certify to the secretary of the Parole Board the minimum and maximum penitentiary penalties for the crime whereof said person has been convicted, and said certificate shall be of the same force and effect as if the facts stated in the certificate had been included in the original sentence and judgment on conviction by the said court."

At the conclusion of the testimony the defendants' counsel moved for a directed verdict on the ground that there was no testimony to justify a verdict against them, and the refusal of the court to grant it is assigned as error.

Error is also assigned by reason of the giving of the following instructions:

"3.

"I therefore instruct you that if you find from the evidence in this case beyond a reasonable doubt, that these defendants or any two of them, while acting and conspiring together, in this county and state, at the time named in the indictment, did assault one Eng Chong, with intent to then and there kill him, the said Eng Chong, by then and there shooting at the said Eng Chong with a pistol, loaded with powder and ball, and while within shooting distance of and with intent to kill him, the said Eng Chong, then it will be your duty to find such defendants that you find acted and conspired together guilty as charged.

"4.

"I further instruct you that if you find from the evidence in this case beyond a reasonable doubt, that on the 16th day of February, 1917, in this county and state, either of the defendants named in the indictment, while acting alone and not in conjunction with the other defendants, did assault Eng Chong, named in the indictment, with intent to kill him, the said Eng Chong, by then and there shooting at the said Eng Chong, with a pistol loaded with powder and ball, and in shooting distance of and with intent to kill the

said Eng Chong, then you should find such defendant guilty as charged, and the other two defendants not guilty.

"7.

"I instruct you that where two or more persons are associated together for the purpose of doing an unlawful act, the act or declaration of one of such persons, while engaged in or pursuant to the common object or design, is the act or declaration of all, for which all are liable, and each person so associated is deemed or presumed to have consented to or commanded what was done by any of the others.

"8.

"I instruct you that a conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself unlawful or criminal, by criminal or unlawful means.

"9.

"I further instruct you that while it is necessary in order to establish the existence of a conspiracy, to prove a combination of two or more persons by concert of action to accomplish a criminal or unlawful purpose, yet it is not necessary to prove that the conspirators came together and entered into a formal agreement to effect such purpose. Such common design and purpose may be regarded as proved, if the jury believe from the evidence, beyond a reasonable doubt, that the parties to such conspiracy were actually pursuing in concert the common design and purpose, whether acting separately or together, by common or different means, providing they were all leading to the same unlawful purpose.

"10.

"I therefore instruct you that if you are satisfied from the evidence in this case beyond a reasonable doubt, that the defendants had entered into a conspiracy to shoot and kill Eng Chong, and in pursuance of such conspiracy, common design and purpose, the

defendant Chong Ben shot at the said Eng Chong, with a pistol with intent to kill him, the said Eng Chong, at the time and place named in the indictment, then it will be your duty to find all of the defendants guilty as charged in the indictment.

"11.

"I instruct you that if you find from the evidence in this case beyond a reasonable doubt that one of the defendants shot at Eng Chong with a pistol with intent to kill him, the said Eng Chong, and the other defendants were present, aiding and abetting him in the shooting, then you should find all of the defendants guilty as charged in the indictment.

"12.

"I instruct you that you may find one or more of the defendants guilty and the others not guilty. If the testimony satisfies you beyond a reasonable doubt, that either of the defendants is guilty of the crime charged, then you should find such defendant guilty. On the other hand, if you entertain a reasonable doubt from the evidence as to the guilt of either of the defendants of the crime charged, then you should find such defendant not guilty." AFFIRMED.

For appellants, in Supreme Court only, there was a brief over the name of *Messrs. Cochran & Eberhard,* with oral arguments by *Mr. George T. Cochran* and *Mr. Colon R. Eberhard.*

For the State there was a brief over the names of *Mr. John S. Hodgin,* District Attorney, and *Messrs. Crawford & Eakin,* with oral arguments by *Mr. Hodgin* and *Mr. Thomas H. Crawford.*

McBRIDE, C. J.—1, 2. It is claimed by the appellants that the act of 1917 repealed by implication Section 1586, L. O. L., *supra,* as amended by Chap. 127, Laws of 1911, and also Sections 1592 and 1724, L. O. L., as amended by Chap. 127, Laws of 1911, but we are of

the opinion that Section 14 last above quoted preserves the operation of the original sections as to offenses committed before the act of 1917 went into effect, except as to Section 1586, and as to this we are of the opinion that Section 17 of the act of 1917 is palpably void in so far as it attempts to limit the right to a parole. Section 20 of Article IV of the Constitution is as follows:

"Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The title of the act of 1917, *supra,* is as follows:

"AN ACT to amend Sections 6, 7, 8, 14, 15, 16 and 17 of Chapter 127 of the General Laws of the State of Oregon for the year 1911, entitled 'An Act to entend and define the indeterminate sentence; to create a Parole Board, and to provide its powers and duties.' "

3. It will be seen that the title confines the scope of the act to the amendment of certain sections of Chap. 127, and the sections so amended are set forth at full length as amended. The act giving judges power to parole after sentence is contained in Chap. 108, Laws of 1911, and consist of a single section. It relates to a different matter from executive paroles and is not so connected with it as to logically form part of the same act. It is not embraced in the title and considered as an amendment is open to the criticism that the section which it purports to amend is not set forth at full length. It does not purport in terms to amend Chap. 108, and repeals by implication are not favored. It may also be noted that the act of 1911 has no repealing clause as to other acts upon the same subject,

so there is no express repeal of Chap. 108. The defendants were sentenced according to the provisions of the law as it stood before the passage of the act of 1917, and in this the court pursued the correct course. It would be going very far to hold that there was no evidence against the defendants. In our judgment the evidence was strong.

4. The testimony for the state indicated that there was some dispute or difference between the defendants and Eng Chong about a hospital bill incurred by Eng Chong, and which for some reason had been paid by the defendants or their friends. Shortly before the shooting the defendants and another Chinaman were discussing the matter together, and one of them was heard to ask Chong Ben if Eng Chong had paid back the hospital fees, to which interrogatory Chong Ben replied in effect that he had not, and that if he did not "he" or "they" (the witness gave the conversation both ways) would take a couple of shots at him. While standing alone this would not be sufficient to establish a conspiracy, yet when this threat is supplemented with evidence that Chong Ben, the man who made the threat, fired through the windows at Eng Chong, and immediately after the shooting he was seen running away from the scene with a pistol in his hand and accompanied by the other defendants, there was certainly evidence that he and they were engaged in a conspiracy to take the life of Eng Chong. There are some other incidents detailed in the testimony which, in a remote degree, tend in the same direction, but if there was any testimony tending to establish a criminal conspiracy, its weight was a question for the jury. Where three men are together discussing a common grievance and one is heard to say to

the other two, "If this grievance is not redressed I will shoot the offender" and thereafter the one making the threat accompanied by his two companions seeks the offending party, shoots at him, and all three run away together from the scene of the crime, the average unprejudiced man would say that these facts indicated that somewhere along the line there had been a criminal conspiracy between the three to commit the offense. Substantially, that is the case here if the state's witnesses are to be believed, and the jury evidently believed them.

The circumstances of this case differentiate it from the case of *State* v. *Quen,* 48 Or. 347 (86 Pac. 791). In that case the threat was made by the defendant in the presence of other persons who, so far as the testimony indicated, were mere passive spectators, taking no part in the conversation; while here all the parties present were discussing the grievance on two occasions and on both the same threat was made by one of them, and all three were subsequently identified at the scene of the crime.

5, 6. There is practically no objection to the instructions considered as abstract statements of the law, but it is urged that there being no evidence of a conspiracy between the defendants they were erroneous because not applicable to the evidence. As already shown, there was sufficient evidence of conspiracy to justify submission of the case to the jury and so far as the objections are based upon the ground of inapplicability to the facts they must fail.

7. It is also objected that instruction No. 7 assumes the existence of a conspiracy and, therefore, trenches upon the province of the jury, but we find nothing to justify this criticism. The instructions taken as a

whole are eminently clear and free from even technical error, fairly presenting every phase of the case.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

PETITION FOR REHEARING.

On petition for rehearing. Denied.

Messrs. Cochran & Eberhard, for the petition.

Mr. John S. Hodgin, District Attorney, and *Messrs. Crawford & Eakin, contra.*

In Banc.

McBRIDE, C. J.—Much of the argument in the petition for rehearing is devoted to criticism of Instruction No. 7, which is set forth in full at page 318, *ante* (173 Pac. 258). A careful reading of that instruction will not disclose a single one of the multifarious errors which the astuteness of counsel imputes to it. It is urged that the instruction is a mere abstract statement of the law. We think this objection sufficiently answered by our former opinion.

The second objection is that it "permits the jury to use acts and declarations of one against all defendants, regardless of proof of conspiracy, or whether proof of conspiracy existed at the time of the act or declaration." The instruction will not bear such a construction. We reproduce it in its entirety:

"I instruct you that where two or more persons are associated together *for the purpose of doing an unlawful act,* the act or declaration of one of such persons, *while engaged in or pursuant to the common object or design,* is the act or declaration of all, for which all are liable, and each person so associated is

deemed or presumed to have consented to or commanded what was done by any of the others."

8. In the hypothetical case assumed by the instruction there must be, (1) two or more persons associated for the purpose of doing an unlawful act, before the declaration of one conspirator will bind the others who are associated with him in the common design, and (2) the act or declaration to be binding upon a defendant, other than the one actually performing the act or making the declaration, must be "pursuant to the common object or design." The instruction is clear and does not carry with it the construction attributed by counsel.

9. The other objections to the instruction, briefly stated, are (1) that it permits the jury to use the acts and declarations of one defendant to prove the conspiracy as to all; (2) that it assumes the existence of the conspiracy, and, (3) that it does not require the jury to first determine from the evidence the existence of a conspiracy before considering any evidence of acts or declarations of one defendant against another. A mere reading of the instruction will convince any unprejudiced mind that these objections are each and all unfounded. The instruction was clear and correct as to the proposition stated, and it is not claimed that any further limitations or explanations were asked by counsel for the defense. As stated in our former opinion, there was ample evidence to justify every instruction given. An instruction that the jury must first be satisfied that a conspiracy existed before considering evidence of the acts or declarations of one defendant as against another, would have been proper although we think it might reasonably be deduced from the language used in Instruction No. 7, but no such instruction was requested. In the absence of

such request the court had a right to assume that the defendants had no desire for further instruction upon that point.

It is needless to consume time and space discussing points already passed upon in our original opinion, or to discuss in detail the authorities cited by counsel. They were all carefully considered and we have found no reversible error in the proceedings, nor are we able to see how in any respect the rights of the defendants either under the Constitution of the United States or of this state have been infringed upon.

The petition is denied. REHEARING DENIED.

Argued June 21, affirmed July 23, 1918.

PORTLAND v. PUBLIC SERVICE COMMISSION.*

(173 Pac. 1178.)

Carriers—Public Service Commission—Change of Rates—Proceedings.

1. The fact that proceedings of the Public Service Commission of Oregon increasing the rate of fare charged by a street railway were not instituted by the state does not affect validity thereof; the commission being allowed by Section 45 of the act creating it (Laws 1911, p. 483) to act on its own motion, by Section 46 on petition of the public utility itself, and by Section 41 on complaint of any three persons, firms, corporations or associations, or any mercantile, agricultural or manufacturing society, or any political organization.

[As to validity of regulation fixing minimum rate to be charged by public service corporation, see note in **Ann. Cas. 1916A, 933.**]

Municipal Corporations—Grant of Franchise—Acceptance—"Grant."

2. Under Portland City Charter, Section 94, giving city council the right to grant a franchise, the franchise does not become operative until grantee has accepted; the word "grant" implying offer by city and acceptance by company.

Constitutional Law—Police Power.

3. Police power is not restricted to public peace, health and safety, but covers the general welfare of the people; Article I, Section 1, of the Constitution, stating that governments are instituted for the peace, safety, and happiness of people.

*Authorities discussing the question of right to raise rates of public service corporations fixed by franchise are collated in a note in **L. R. A. 1915C, 287.** REPORTER.

Corporations—Public Service—Regulation of Rates.

4. It is primarily the duty of the State, in the interests of the public, to see that all concerns that serve the public be content with and are entitled to receive reasonable compensation for their services.

Carriers—Regulation of Rates—Police Power.

5. Regulation of rates of the fares of a street railway is within the police power of the state.

Municipal Corporations—Franchise—Right to Make.

6. A city's right to grant franchise to street railway was as an agent of the state.

Constitutional Law — Impairing Right to Contract — Franchise—Carrier's Charges.

7. Order of Public Service Commission, changing rate of fare provided for by franchise granted street railway by city, is not void for impairment of contract rights, as the state, having granted franchise through the city as its agent, has right to change the provisions thereof through its representative, the Public Service Commission.

Constitutional Law — Due Process of Law — Changing Carrier's Charges.

8. Public Service Commission's order changing the rate of fare provided for in street railway franchise granted is not void, because of depriving the city and its inhabitants of property and rights without due process of law, as the state, having granted franchise through city as its agent, has right to modify franchise by changing the rate of fare through its representative, the Public Service Commission.

Carriers—Regulating Rates—Cities—Public Service Commission.

9. City's authority to represent the state in regard to the fares of a street railway, which had been given a franchise, was annulled by act creating Public Service Commission, and such authority given to such commission, who as state's agent could agree to change in the franchise allowing company an increased rate of fare.

Carriers—Statutory Regulation—Creation of Public Service Commission—Retroactive Effect.

10. Order of Public Service Commission is not void, because the fare changed was agreed on by a franchise entered into prior to the enactment of the law creating the commission; the law being designed to deal with conditions as they arise.

From Multnomah: Judges JOHN P. KAVANAUGH, ROBERT G. MORROW, ROBERT TUCKER, GEORGE W. STAPLETON, WILLIAM N. GATENS and CALVIN U. GANTENBEIN Sitting in Banc.

In Banc.

The City of Portland, a municipal corporation, instituted this suit against the Portland Railway, Light

and Power Company, a corporate concern operating a street railway in that city, and thereby seeks to nullify an order made by the defendant, the public Service Commission of Oregon, allowing the company to charge six cents for the transportation of each person over its lines in the same general direction, instead of five cents as prescribed by an ordinance enacted by the council of the plaintiff and conferring upon the company the franchise under which it operates. A general demurrer to the complaint was sustained by the circuit judges in Multnomah County sitting in banc. The city appealed. AFFIRMED.

For appellant there was a brief over the names of *Mr. Walter P. La Roche,* City Attorney, *Mr. Martin L. Pipes, Mr. H. M. Tomlinson* and *Mr. Wilson T. Hume,* with oral arguments by *Mr. La Roche* and *Mr. Pipes.*

For respondent, Public Service Commission, there was a brief over the names of *Mr. George M. Brown,* Attorney General, and *Mr. John O. Bailey,* Assistant Attorney General, with an oral argument by *Mr. Bailey.*

For respondent, Portland Railway, Light & Power Company, there was a brief over the names of *Mr. Frederick V. Holman, Messrs. Griffith, Leiter & Allen* and *Mr. W. C. Benbow,* with oral arguments by *Mr. Holman* and *Mr. Rufus A. Leiter.*

BURNETT, J.—The essence of the dispute presented in this litigation is whether upon the application of a public service corporation like the company the Public Service Commission of the state had the authority to change the rate of fare prescribed by the city ordinances giving the company the right to oper-

ate street railways in the City of Portland. The proper disposition of this suit depends upon the solution of that question of jurisdiction. We are not concerned with the wisdom of the commission's decision. Whether it acted wisely or not in increasing the rate of fare is not for our decision in this case on demurrer to the bill. If we find that it had jurisdiction to make the change, our quest is ended.

The charter under which the City of Portland operates was embodied in an act of the legislative assembly approved January 23, 1903, and approved by a popular vote of the citizens of that municipality. Section 3 of that act declares that the city

"shall be invested within its limits with authority to perform all public services and with all governmental powers, except such as are expressly conferred by law upon other public corporations and subject to the limitations prescribed by the constitution and laws of the state, except as hereinafter provided."

Respecting the grant of franchises, the authority therefor is found in Section 94, reading thus:

"The council may, subject to the limitations and conditions contained in this charter, grant, for a limited time, specific franchises or rights in or to any of the public property or places mentioned in the preceding sections. Every such grant shall specifically set forth and define the nature, extent and duration of the franchise or right thereby granted, and no franchise or right shall pass by implication. At all times the power and right reasonably to regulate in the public interest the exercise of the franchise or right so granted shall remain and be vested in the council, and said power and right cannot be divested or granted."

The next following section limits to a period of twenty-five years the time for which a franchise may be granted and requires that the amount and manner

of compensation to be paid by the grantee shall be fixed and gives the right to the city to purchase the business and property at the expiration of the grant, if authorized by the voters of the city. A provision is also made for fixing the method of ascertaining the value of the property thus to be acquired by the municipality.

The legislative assembly of this state afterward passed the act of February 24, 1911, entitled:

"An Act to define public utilities, and to provide for their regulation in this State, and for that purpose to confer upon the Railroad Commission of Oregon power and jurisdiction to supervise and regulate such public utilities, and providing the manner in which the power and jurisdiction of such Commission shall be exercised, prescribing penalties for the violation of the provisions of this Act and the procedure and rules of evidence in relation thereto, making an appropriation to carry out the provisions hereof, amending Section 2 of Chapter 53 of the Laws of Oregon for the year 1907, the same being Section 6876 of Lord's Oregon Laws, and declaring an emergency."

By proper legislation the Railroad Commission referred to in the act has since been denominated the Public Service Commission. Among other things, any plant or equipment used for the transportation of persons or property by street railways as common carriers is defined by the statute to be a public utility. Section 6 of the law vested the commission "with power and jurisdiction to supervise and regulate every public utility in this state and to do all things necessary and convenient in the exercise of such power and jurisdiction."

Section 7 in part reads thus:

"Every public utility is required to furnish adequate and safe service, equipment and facilities, and

the charges made by any public utility for any * * transportation of persons or property by street railroad, or for any service rendered or to be rendered in connection therewith shall be reasonable and just and every unjust or unreasonable charge for such service is prohibited and declared to be unlawful."

It is said in Section 33:

"The commission shall provide for a comprehensive classification of service for each public utility and such classification may take into account the quantity used, the time when used, the purpose for which used, and any other reasonable consideration. Each public utility is required to conform its schedules of rates, tolls and charges to such classification."

In Sections 41 to 46, inclusive, it is laid down that the commission may prescribe reasonable rates, etc., after a hearing either on the complaint of any mercantile, agricultural or manufacturing society or by any body politic or municipal organization or by any three persons, firms, corporations or associations (Section 41); or on its own motion (Section 45); or on the petition of the public utility itself (Section 46). Section 51 empowers the commission after investigation to order the substitution of reasonable rates and charges instead of those which it shall find to be unjust or unreasonable, and, by the following section, it may afterward revise its own decision. Under Section 54, any public utility or other person, persons or corporation interested in, or affected by, any order of the commission fixing any rates, tolls, charges, schedules and so forth, may sue in the county where the hearing was held, to set aside the order on the ground that it is unlawful. It is said substantially in Section 61 that every municipality shall have power to determine by contract, ordinance or otherwise the quality and character of service furnished by any public util-

ity within the municipality, and all other terms not inconsistent with the act upon which it may occupy the streets with its plant, and such contract, ordinance or other determination shall be in force and *prima facie* reasonable, but upon complaint made by the public utility, or any other qualified complainant, the commission shall hear and determine the question and after it finds the same to be unreasonable the contract, ordinance or other municipal determination shall be void:

"*Provided, however,* that no ordinance or other municipal regulation shall be reviewed by the commission under this section which was prior to such review enacted by the initiative or which was prior to such review referred to and approved by the people of said municipality or while a referendum thereon is pending."

In substance, it is stated in the complaint that since the adoption of the public utilities statute the City of Portland, operating by the initiative process, amended its charter so as to assume, so far as it had power so to do, the right to regulate and prescribe rates, and other matters, practically the same as the Public Service Commission. It does not appear, however, in that pleading that the city ever attempted to pass any ordinance changing the previously granted franchise of the company, and it is sufficient to say in this connection that the only acts of the city sought to be reviewed by the commission in this instance were the ordinances passed by the common council. These were never referred to the people for their approval and were not the subject of the initiative process. Plainly they are not within the restriction of the quoted proviso.

1, 2. The complaint urges that the State of Oregon did not institute the proceeding whereby the rate of fare was increased from five to six cents. This conten-

tion is without merit, for the act of 1911 creating the commission allows it to act on its own initiative, as well as upon the petition of the public utility itself or of certain other persons already mentioned. It is also said that the action of the commission is void because it violated the constitutional provisions forbidding any state to impair the obligation of a contract, and that it deprived the City of Portland and its inhabitants of their property and rights without due process of law. This presents the principal question for consideration. It is urged that the ordinances under which the railway company and its predecessors in interest have acted were offers to them which they were required to, and did, accept before proceeding to operate their plant, and that this constituted a contract between the City of Portland and the company which cannot be violated by any subsequent legislation. In support of its contention in this respect, the city cites *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 537 (48 L. Ed. 1102, 24 Sup. Ct. Rep. 756), *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368 (46 L. Ed. 592, 22 Sup. Ct. Rep. 410), and *Detroit United Rys.* v. *Michigan*, 242 U. S. 238 (61 L. Ed. 268, 37 Sup. Ct. Rep. 87). In all those cases the state had expressly and literally authorized the municipality in so many words to adjust the matter by contract. The Portland charter under consideration says nothing about a contract, but speaks of a grant and requires legislative action. True it is that the franchise does not become operative until the grantee has accepted. The term "grant" implies offer of the city and acceptance by the company, for the municipality cannot fashion a grant and compel anyone to accept it. The distinction is too finely drawn whereby government control of rates according to reasonableness is applicable to the so-called

"grant" cases and withheld from those which may be called "contract" cases. But all of such conventions, whether of pure contract or by public grant, are made subject to the ever-present principles that the charges shall be fair and reasonable and that the right to adjust them is primarily a prerogative of the state.

3–5. The argument of the plaintiff is that the public peace, health and safety comprise the sole objects of the police power of the state; that these are not affected by the rate of fare to be charged by a street-car company, and hence that the police power is not available to modify the rates. But, as held in *Woodburn* v. *Public Service Commission,* 82 Or. 114 (161 Pac. 391, Ann. Cas. 1917E, 996, L. R. A. 1917C, 98), the police power is not restricted to such narrow limits. As stated in Article I, Section 1, of our state Constitution, governments are instituted for the peace, safety and happiness of people. In other words, the general welfare of the people is within the police power of the government and one of the peculiar objects of its care. The discussion of the plaintiff omits all consideration of the principle that it is primarily the duty of the state, in the interests of the public, to see that all concerns that serve the public be content with, and also are entitled to receive, reasonable compensation for their services: 10 C. J. 411. All rate regulations depend upon this principle. Reasonableness is the pole-star in all investigations of the subject. Conditions change and what was reasonable twenty years ago may be unreasonably high or unreasonably low to-day. The question to be decided is: Who shall determine this, and is the contract subject to revision in that respect?

6. Considering the matter as one of contract, we find the doctrine thus stated in *Cleveland* v. *Cleveland City*

Ry. Co., 194 U. S. 537 (48 L. Ed. 1102, 24 Sup. Ct. Rep. 756), relied upon by the plaintiff:

"That passing ordinances based upon the grant or referred to the municipal council of Cleveland was exercising a portion of the authority of the state, as an agency of the state cannot in reason be disputed."

So, in this instance, the state in the exercise of its legislative power created the City of Portland its agent for the purpose of initiating an arrangement whereby the company could operate its cars and charge a compensation therefor within the city. The state might have appointed any other agency to work out the same result. It did not in any sense surrender its right to recall that agency and confer it upon another. It did not in any manner, nor could it, abdicate its authority under the police power to enforce a reasonable rate of fare as against the stipulations of contracting parties. That the regulation of rates is a prerogative of the state as to carriers operating wholly within its borders is taught in *Simpson* v. *Shepard*, 230 U. S. 352 (Ann. Cas. 1916A, 18, 48 L. R. A. (N. S.) 1151, 57 L. Ed. 1511, 33 Sup. Ct. Rep. 729). The legislature in delegating this authority to the city by the 1903 charter did not, nor could it, undertake to control the future legitimate exercise of the law-making power. The authority to delegate involves the power to revoke. That this may not be done in this instance by special law enacted by the legislative assembly amounting to a direct amendment of the Portland charter is granted; but that a general law of paramount authority over all municipal charters constitutionally may be enacted by the legislative assembly is taught in *Rose* v. *Port of Portland*, 82 Or. 541 (162 Pac. 498). Covering the whole field of public utilities throughout the state as it does, except those owned

by municipalities, the statute under which the commission acts operates to transfer the agency in that matter from the city to the commission, annulling the authority of the former. The case of the plaintiff is not aided by the subsequent amendments to the charter whereby the effort was to invest the municipality with substantially all the authority over public utilities operating within the city that was conferred upon the commission. There are two reasons for this. One is that although the city by these changes in its organic law asserted the right to regulate rates, it has not exercised the right. Another is that the scope of the initiative and referendum power vested in the legal voters of municipalities is confined to "local, special and municipal legislation": Article IV, Section 1a, state Constitution. This section explains and limits the language of Section 2 of Article XI of the same instrument authorizing the legal voters of cities and towns "to enact and amend their municipal charter subject to the constitution and criminal laws of the State of Oregon," with the result that the city is debarred from assuming on its own initiative a power which is peculiarly a prerogative of the state itself. Regulation of rates is such a power. It affects the general public and not merely the inhabitants of any single city, and never could have been exercised by the plaintiff unless delegated to it by the state. The constitutional provisions for "local, special and municipal legislation" by the initiative were never intended as permission to cities and towns to arrogate to themselves powers otherwise primarily resident in the state. All authority whatever possessed by cities and towns emanated from the state. They cannot further invade its original sovereign prerogative unless the attempt is referable to "local, special and munici-

pal legislation." The state, operating through its legislative assembly or directly by its people, exercising the initiative, is still paramount in the matter of making laws. It can delegate authority to its subordinate governmental agencies and it can revoke it. Moreover, all that is done under the appointment is subject to the ever-present and all-pervading principle that for the public good the state may control all stipulations for public service. Substantially this is a condition of every such agreement.

7–9. On the basis of contract the situation then presented is this: the state, acting by and in the name of its agent, the city, made an agreement with the company. It later created the Public Service Commission, giving it general authority over all such and kindred matters everywhere in Oregon except as stated. By this legislation there came into existence a new representative of the state endowed by it with plenary power and to which the other party to the so-called agreement applied for a modification thereof. After investigation and deliberation which may be likened to negotiations between contracting parties, the state by its agent, the commission, has consented to a change in the contract, allowing the company to charge an increased rate of fare. Whatever might be said if one of the parties to the contract without the consent of the other should attempt to change it, whether by legislation impairing the obligation of the contract or otherwise, it does not apply to the present situation, for, as stated, the contracting parties have themselves agreed to the change.

10. Finally, the complaint urges that the order of the commission is void because the public utilities act is not retroactive. This contention may be dismissed with the statement that the law does, and is designed to, deal with conditions as they arise and to adjust

matters relating to concerns serving the public from time to time as may be required.

The principal features of the instant case are controlled by *Woodburn* v. *Public Service Commission,* 82 Or. 114 (161 Pac. 391, Ann. Cas. 1917E, 996, L. R. A. 1917C, 98). The voluminous briefs and multitude of precedents cited by industrious counsel have been carefully examined and we discern no reason for changing the rule announced in that case. Substantially the same conclusion was reached by the Supreme Court of Montana in *State ex rel.* v. *Billings Gas Co.,* 173 Pac. 799, decided June 24, 1918, and not yet reported officially. Other cases, among still other numerous precedents which might be cited, will aid in the investigation of the question and are here noted: *Worcester* v. *Worcester Consol. St. Ry. Co.,* 196 U. S. 539 (49 L. Ed. 591, 25 Sup. Ct. Rep. 327); *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349 (14 Ann. Cas. 560, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529); *Home Telephone & Telegraph Co.* v. *Los Angeles,* 211 U. S. 265 (53 L. Ed. 176, 29 Sup. Ct. Rep. 50); *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467 (34 L. R. A. (N. S.) 671, 55 L. Ed. 297, 31 Sup. Ct. Rep. 265); *Portland Ry., Light & Power Co.* v. *Railroad Commission,* 229 U. S. 397 (57 L. Ed. 1248, 33 Sup. Ct. Rep. 820); *Board of Survey* v. *Bay State Street Ry. Co.,* 224 Mass. 463 (113 N. E. 273); *Benwood* v. *Public Service Commission,* 75 W. Va. 127 (83 S. E. 295, L. R. A. 1915C, 261, and notes); *Pinney & Boyle Co.* v. *Los Angeles Gas & Electric Corp.,* 168 Cal. 12 (141 Pac. 620, Ann. Cas. 1915D, 471, L. R. A. 1915C, 282); *State ex rel. Webster* v. *Superior Court,* 67 Wash. 37 (120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287).

The Circuit Court was right in dismissing the bill and its decision is affirmed. AFFIRMED.

Argued July 10, affirmed July 23, 1918.

STUDLEY *v.* LUSE.*

(173 Pac. 1182.)

Taxation—Liens for Taxes and Special Assessments—Priorities.

1. Under Sections 3540–3735, L. O. L., as to revenue and taxation, a lien for general taxes, although subsequent in time, is prior and superior to a lien for special assessments for street improvement made by City of Eugene pursuant to Section 58 of its charter, as to priority of lien for special assessment, and owner of lien for general taxes is entitled to foreclose it without first paying the city the amount of the special assessment.

Statutes—Construction—Adoption from Other State.

2. It is a general rule that when one state adopts the law of another, and that law has been construed by the highest court of the latter state, such construction will be followed.

[As to construction of adopted statutes, see note in Ann. Cas. 1917B, 651.]

From Lane: JAMES W. HAMILTON, Judge.

Department 2.

This is a suit to foreclose a tax certificate of delinquency of Lane County for the year 1913 and the amount of subsequent taxes on Lots 1 and 2 in Block 2 of Fairmount in the City of Eugene. That city and the owners of the property were defendants and the owners made default. The complaint is in the usual form for such suits and, among other things, it alleges that the City of Eugene as a municipal corporation "claims some lien against said property by virtue of a paving assessment."

The city filed an answer in which the material allegations of the complaint are admitted, and for a further and separate defense alleged that on March 25, 1912, the common council of the city determined to improve the streets in front of the property covered by

*On superiority of lien for special assessments over lien for taxes, see note in 30 L. R. A. (N. S.) 768. REPORTER.

the tax certificate of delinquency and duly passed an ordinance for such improvement; that pursuant to such ordinance the contemplated improvements were made and on January 21, 1913, the city assessed the cost thereof to the abutting property, which is the property described in the complaint; that the amount of such assessment against the property was $603.39, which on January 23d was entered in the docket of city liens. The answer also pleaded the city charter which provides that such an assessment entered on such city liens "is to be deemed a tax levied and a lien against such property, which lien shall have priority over all other or subsequent liens or encumbrances whatever upon the property against which the cost of said improvements or repairs is assessed, and shall be enforced in the manner in this chapter provided"; that it is now a subsisting lien and became and is a first and prior lien on and against the property, including the tax lien of plaintiff.

The plaintiff filed a demurrer to the further and separate answer, which was sustained, and the city refused further to plead. A decree was entered in favor of the plaintiff for the amount of the tax certificate of delinquency and directing that the property be sold and the proceeds applied to the satisfaction of the decree, from which this appeal is taken. No question is raised as to the pleadings, the validity of either assessment or the lien under the assessments, and the only controversy is as to the priority of plaintiff's lien by virtue of his tax certificate of delinquency over the lien of the city for street improvements and whether it was the duty of the plaintiff to pay the city the amount of its lien before he should be entitled to a decree of foreclosure under his certificate.

AFFIRMED.

For appellant, City of Eugene, there was a brief and an oral argument by *Mr. O. H. Foster.*

For plaintiff-respondent, there was a brief and an oral argument by *Mr. L. M. Travis.*

JOHNS, J.—Lord's Oregon Laws, Sections 3540 to 3735, inclusive, provide for "revenue and taxation" and specify what property shall be assessed, for what purposes and by whom it shall be assessed; provide for the equalization of such assessments and for a board of tax commissioners, and define the powers and duties of such board. Provision is made for the County Court to levy taxes; for the collection of all taxes, specifying by whom such taxes shall be collected, when they are to be paid, and providing for the enforcement of such collection; the payment thereof to the county treasurer; and for the segregation of the funds so received and the disbursement thereof by the county treasurer. Section 3551 provides:

"All real property within this state, and all personal property situated or owned within this state, except such as may be specifically exempted by law, shall be subject to assessment and taxation in equal and ratable proportion."

Section 3552 defines what is "land" and Section 3553 defines what is "personal property." Section 3555 provides:

"All lands within the boundary of any county road, and all dedicated streets and alleys in any incorporated or unincorporated city or town, or town plat, within this state, shall be exempt from assessment and taxation while used for such purposes."

Section 3666 gives the meaning of the term "tax collector," as follows:

"The words 'tax collector,' wherever used in this act, shall be taken to mean the person or officer who by law is charged with the duty of collecting taxes assessed upon real property, and shall be held to include his deputy."

Section 3667 specifies that "the sheriff of each county shall be the tax collector thereof."

In the matter of tax liens and priority thereof, Section 3684 provides:

"All taxes which may be hereafter lawfully imposed, charged, or levied upon real property, including taxes on personal property charged upon real property as provided in the preceding section, shall be, and they are hereby, declared to be a lien upon such real property from and including the day on which the warrant authorizing the collection of such taxes upon real property is issued. * * Such liens shall have priority to and shall be fully paid and satisfied before any and every judgment, mortgage, or other lien or claim whatsoever, except the lien for a tax for a subsequent year; and every certificate of delinquency * * shall be deemed to assign to and vest in the holder, purchaser or transferee the lien herein prescribed."

There are other sections of the statute which provide for the manner of levying taxes, by whom and for what purposes such levies shall be made, and for the filing of the certificate thereof with the county clerk. The whole plan of "revenue and taxation" is to provide adequate funds for the operation and maintenance of the state government and its subordinate branches. To insure the collection of the necessary funds the taxes so levied are made a first and prior lien over any and all other liens, "except the lien for the tax for a subsequent year."

By special act of the legislature the City of Eugene was reincorporated in February, 1905. Section 58 of the charter then granted it provides that:

"The docket of city liens is a public writing, and the original, or a copy, certified by the City Recorder, of any matter authorized to be entered therein are entitled to the force and effect of a judgment, and from the time of the entry therein of an assessment against any property, the sum so entered is to be deemed a tax levied and a lien against such property, which lien shall have priority over all other or subsequent liens or encumbrances whatever upon the property against which the costs of said improvements or repairs is assessed, and shall be enforced in the manner in this chapter provided."

1. Under this section it is contended that a lien for city improvements is superior in time and right to a tax lien which is levied to provide necessary funds to maintain the state administration and its subordinate branches. We do not think that the legislature ever intended to enact a law which would give priority to a city lien for street improvements over the lien of taxes levied for governmental purposes. In legal effect such a law would make the whole system of our state government and its institutions subordinate and inferior to the municipal administration of the City of Eugene. We do not think that is the law and it is the opinion of the writer that such a law would be void. The provision in the city charter to the effect that a lien for street improvements "shall be deemed a tax" does not mean that it shall be a tax for governmental purposes or that it shall be collected by the sheriff or tax collector. There is a marked difference between a lien levied for a street improvement and a lien levied as a tax for governmental purposes. The one is levied under a local or special law; the other is levied

under a general law. The general law provides that a tax when levied shall be a lien upon the specific property assessed and also that streets, alleys and county roads shall be exempt from assessment and taxation. Assessments for street improvements cannot be levied upon the specific property improved, they can be levied against the abutting property only.

2. Our present law as to the priority of a tax lien over the lien for a street improvement is a substantial copy of the former law of the State of Washington. While not inflexible, yet it is a general rule that when one state adopts the law of another and that law has been construed by the highest court of the latter state such construction will be followed. In the case of *McMillan* v. *Tacoma,* 26 Wash. 358, 363 (67 Pac. 68) it was decided that:

"Under that declaration of the legislature it must be held that the holder of a delinquent general tax certificate is not required to pay local street assessment liens before he can proceed to foreclose and sell under his general tax lien. He is entitled to a decree establishing his tax lien as paramount and superior to all other liens or charges against the property."

"The state and its subordinate municipalities cannot exist without the collection of public revenue, and serious confusion would result if the lien of taxes levied for that purpose would remain inferior to, or equal with, local assessments or other liens."

The decree of the Circuit Court is affirmed.

AFFIRMED.

McBRIDE, C. J., BEAN and BENSON, JJ., concur.

Argued June 6, affirmed July 23, 1918.

HORST *v.* COLUMBIA CONTRACT CO.

(174 Pac. 161.)

Collision—Remedy—Action at Law.

1. Section 5203, L. O. L., declaring liable in treble damages, which shall be a lien on the boat, a person in control of a boat, and likewise his employer, which is intentionally or negligently navigated so as to injure property of another, allows actions at law *in personam* against operator or owner employer; enforcement of lien not being sought.

Exceptions, Bill of—Form—Alternative.

2. Under Section 171, L. O. L., as amended by Laws of 1913, page 650, so as to re-enact the old section as to the form of a bill of exceptions, with added proviso that it may consist of a transcript of the testimony, etc., it is optional with the trial court to settle it in the old form or certify it in the form of the proviso.

Collision—Navigation and Fishing—Respective Rights.

3. While the right of navigation may be exercised on any part of a stream susceptible of navigation and is paramount to that of fishing, it cannot be exercised without liability for negligent and unnecessary injury to a fishing boat and its net.

Words and Phrases—"Fairway."

4. A "fairway" is water on which vessels of commerce habitually move.

Trial—Instructions—Construction as a Whole.

5. Instructions as a whole, in action for collision of a steamer with a fishing boat, *held* not open to construction of meaning that it would be negligence for the steamer to be outside the fairway.

Collision—Action—Instructions—Navigation and Fishing.

6. Requested instruction that a boat navigating a stream need not stop or go out of her way or wait on the movements of those managing a net is objectionable as open to construction that she might proceed on her course without regard for rights of fishermen, though not necessary.

Trial—Instructions—Applicability to Evidence.

7. Requested instruction that a vessel need not yield the channel to a fishing net need not be given; it not appearing the fishing net or boat was in the channel.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2.

The plaintiff was engaged in fishing with a gill net for salmon on the Columbia River in August, 1915.

He had a gasoline boat about 30 feet long. He was fishing on Henrici Bar, laying out his net about 200 yards from the Washington shore toward the Oregon shore. The net was about 150 fathoms in length. The current in the river trends from the Washington shore toward the Oregon shore. Having laid out his net he loosed himself from the Oregon end of the net and proceeded to the Washington end, and tied that end of the net to his boat and was engaged in cleaning the timer of his engine when he saw the steamboat "Maria," owned by the defendant, coming down the river with a tow. The steamboat was very close to him and when he saw that it was about to run over him he gave a hallo. The steamboat continued on its course towing its barges until one of the barges struck the plaintiff's boat, when he jumped up and caught hold of the barge which struck him; then the boat was struck by the port barge of the two barges in tow of the "Maria," which barge was a dredge. The accident occurred about 100 yards from the dredged ship channel but nearer to the Washington than to the Oregon shore. The plaintiff, having climbed up on the barges, went to the pilot-house and asked the pilot if he could not see the lights and he answered "No." The steamer backed with its barges until it reached the boat of the plaintiff, when the plaintiff left the steamer and its barges and got into his boat and went ashore. By the collision the boat was damaged and the line which fastened the net to the boat was broken close to the boat, and the net was lost. Plaintiff brought his suit under Section 5203 of Lord's Oregon Laws, alleging his damages at $550 and asking for treble damages in the sum of $1,650. The jury brought in a verdict in his favor for $450. From a consequent judgment defendant appeals.

The complaint charged defendant with negligence in: (1) Failing to observe two lights displayed on plaintiff's boat, to wit, a red light about ten feet above deck, and a white light about five feet above deck. (2) Navigating the "Maria" outside of the channels of the river and outside of the usual course taken by navigators. (3) Failing to avoid the collision. (4) Failing to observe the usual rules of navigation. The complaint asserts no lien on the boat.

The answer admits the existence of the red light, but denies the white one, and denies the negligence and the amount of damages, and alleges that the collision was the result of plaintiff's negligence.

The reply denies the allegations of the answer.

Appellant raises no objection to the evidence, except as follows: Before any testimony was taken in the case the defendant challenged the jurisdiction of the court, claiming that inasmuch as the case was brought under Section 5203 of the Code, it was a suit in equity to enforce a lien and not simply an action at law to recover damages, and inasmuch as the jury had been impaneled and the plaintiff was proceeding as if the complaint presented a cause of action, the court was without jurisdiction to try the cause.

The evidence tended to show that at the time of the collision the plaintiff was drifting down the Columbia River, on the Oregon side of the channel between the states of Oregon and Washington, at a point about four miles above St. Helens, where it is the custom to fish; he had two lights upon the boat, a red light about ten feet above deck, which could be seen at a distance of two miles, and a white light about five feet above deck, which could be seen at a distance of three miles.

The defendant was navigating down the river lighted as required by the rules of navigation, with a full complement of officers and men, but with no regu-

lar lookout aboard, and defendant overtook plaintiff's boat without seeing it until within 200 feet of it. The steamboat could not be stopped in less than 200 yards.

The river at the place where the accident occurred is considerably more than a mile in width and is navigable by boats of the draft of the "Maria" and her tow, practically from bank to bank. AFFIRMED.

For appellant there was a brief over the name of *Messrs. Teal, Minor & Winfree,* with an oral argument by *Mr. Wirt Minor.*

For respondent there was a brief over the names of *Mr. Gus C. Moser, Mr. Roy K. Terry* and *Mr. William A. Williams,* with an oral argument by *Mr. Moser.*

BEAN, J.—1. It is contended by defendant that the action is one to enforce a lien and that plaintiff's remedy is in equity, and defendant challenges the jurisdiction of the law court. Section 5203, L. O. L., reads as follows:

"If any person in the control of any steamboat or other water craft shall intentionally or negligently conduct or navigate the same so as to destroy or injure the property of another, such person and his employer shall each be liable in treble damages for the property so injured or destroyed, and such damages shall be a lien on such boat."

As we read this statute it is to the same effect as though it read that if the property of another is injured as detailed, "such person and his employer and such boat shall be liable," etc. The plaintiff in the first instance is not compelled to proceed against the offending boat, but may proceed by an action *in personam* against the owner or operator of the boat, and compel either party to pay, allowing the lien to re-

main: *Benbow* v. *The James Johns,* 56 Or. 554 (108 Pac. 634); Benedict's Admiralty Practice (3 ed.), § 204. The purpose of the statute was to prescribe the amount of the damages. The right of action existed prior thereto: *Oregon Fisheries Co.* v. *Elmore Packing Co.,* 69 Or. 340, 343 (138 Pac. 862). This is not a suit to enforce a lien. Therefore the law court had jurisdiction to try the cause.

2 Another preliminary question is raised by plaintiff who asserts that the bill of exceptions is insufficient to raise any question urged upon this appeal for the reason that the same consists of a transcript of all the proceedings upon the trial authenticated by the signature of the trial judge. The bill of exceptions includes all the testimony and exhibits, instructions to the jury, the exceptions reserved, and the requested instructions which were not given. By Section 171, Amended Laws 1913, 650, it is optional with the trial court to settle the bill of exceptions in the form required prior to the amendment of the statute, or to certify a bill of exceptions in the form of a transcript of the proceedings. This ruling was announced in an opinion by Mr. Justice MCCAMANT in the case of *Malloy* v. *Marshall-Wells Hardware Co.,* Or. Dec., Vol. 6, No. 1, p. 19 (173 Pac. 267), which had not been published at the time of the argument herein. We follow the holding in that case.

The main contention of counsel for defendant is that the court erred in charging the jury in regard to the fairway or main channel of the river and in regard to negligence predicated upon the same. The court defined negligence and instructed the jury in part as follows:

Instruction V. "Both the plaintiff and the defendant had a right to use the waters of the Columbia River for the respective purposes required by their

business, so long as they made such use with due respect to the rights of the other. With respect to the duty of the defendant, the court will say to you that the defendant was not required, under the law, to maintain a special officer known as a lookout. The duty imposed on the defendant is that the defendant, through the persons in charge of the steamer were required to keep a lookout, a reasonable lookout, so as to avoid collision with any other craft that might be on the river. And if you believe from the testimony that the persons in charge of this steamboat or tug failed in that respect then that would constitute negligence in this case."

Instruction VI. "Or if you should believe from the testimony that the defendant failed to use due and reasonable care with respect to keeping in the fairway or main channel of the river, then that would constitute negligence."

Instruction XIX. "A Juror: There seems to be a little difference between the fairway and the dredged channel. I don't quite understand that point.

"The Court: The fairway and the dredged channel are practically the same thing. The fairway is the way in the river or whatever body of water it might be that is usually traversed by vessels engaged in navigation. It does not necessarily include the entire channel."

Instruction XX. "A Juror: Drawing a lesser amount of draft than what a large ship would, going down the channel,—an ordinary ship not drawing that amount of water would go on the fairway.

"The Court: No, the fairway and the large channel are one and the same thing. Off the large channel the fairway may be used, but it is used at the peril of anyone using it."

Instruction XXI. "A Juror: A ship or steamboat has to keep in the little channel by rights?

"The Court: There is no rule of law requiring it to do so, positive rule of law, it only becomes a question then as to whether the person in charge of the vessel is using reasonable care in doing so or not doing so,—that becomes a question of fact for the jury to de-

termine under all the facts and circumstances of the case,—whether it would conform to the definition of negligence as given you by the Court."

Instruction XXIV. "A Juror: If they keep out of that fairway they do it at their own risk?

"The Court: If they keep out of that fairway they may do so as long as they use reasonable care and caution or are not guilty of negligence as stated to you by the Court. There is no positive rule of law requiring them to be in there. It then becomes a question, whether in or out, whether they are exercising reasonable care."

Exceptions were saved by defendant's counsel to all of these instructions except No. V.

3, 4. The public is entitled to the free, uninterrupted and unobstructed use of a stream, from bank to bank, and throughout the length of the channel, susceptible of navigation by boats, at the ordinary stage of the water. Everyone has an equal right to the reasonable use of the water for all legitimate purposes of travel and transportation. The right of no one is absolute, but each in turn must give way to others. Each must obey the rules which have been established for the safe use of the stream, and must not make such use of it as to unreasonably interfere with the rights of others: 1 Farnham on Waters, § 27; Gould on Waters (3 ed.), § 86. The right to fish and the right to navigate are both natural rights. One cannot be exercised to the exclusion of the other. The right of navigation is paramount. This does not mean that a vessel may navigate a stream upon which there is fishing without due regard to the rights of a fisherman. No unnecessary damage should be done to a fishing boat or net. The paramount right of the larger craft cannot be exercised in a negligent manner and escape liability if unnecessary injury is done to the smaller boat: 1 Farnham on Waters, § 33a; *Hopkins* v. *Norfolk & S. R. Co.*,

131 N. C. 463 (42 S. E. 902). It was the duty of the defendant to use reasonable precaution to keep out of the way of plaintiff's boat: 2 Fed. Stats. Ann., 181, Art. XXVI. "A fairway is water on which vessels of commerce habitually move": 3 Words and Phrases, p. 2651; *Johnnsson* v. *American Tug Boat Co.*, 85 Wash. 212 (147 Pac. 1147).

5. It is contended by counsel for defendant that the jury may have understood the charge to mean that it would constitute negligence for the defendant to navigate outside the main channel of the river. It is possible that the answers to some of the interrogatories by the jurors, if taken alone, might be so construed. Taking them all together, and particularly instruction XXIV, given at the close of the responses to the juror, they were plainly charged that the defendant was within its rights in navigating outside the fairway as long as it used reasonable care and caution and was not negligent while so doing. We think the charge to the jury conforms to the law as stated by the learned counsel for defendant, and that the jury was not informed that it would be negligence for the defendant to be off the fairway.

Defendant's counsel requested several instructions to the jury. By Instruction XVIII, the court informed the jury that the defendant's steamer had the right of way over the fairway of the river because it was engaged in navigation. This was in substance in accordance with defendant's requested Instruction No. IV.

Request No. 5 was to the purport that navigators are required to use such care as is reasonable to avoid injuries to boats, seines and nets. This request was in substance given by the charge.

It is complained by defendant that the jury was not instructed that a boat engaged in navigation on a navigable stream has the right to take her course, doing

no unnecessary damage. The court, however, in different language told the jury in effect that the "Maria" had the right of way over the fairway of the river because it was engaged in navigation. It must it seems to us be taken into consideration that the river where the accident occurred was more than a mile in width, and the dredged channel about 300 feet in width. Such being the case, the jury might reasonably have found that there was plenty of room on the river for the steamboat to run without interfering with the fishing boat, therefore the question whether it was necessary for the "Maria" to run down the small boat, or whether if there had been a proper lookout, and the fishing outfit had been discovered in due time the steamboat could not without inconvenience reasonably have veered so as not to have collided with the plaintiff's craft without changing her actual course on the river within the true meaning of the term "take her course," were questions for the determination of the jury.

Or stated differently, was it necessary for the "Maria" in conveniently navigating the Columbia to come in contact with the fishing boat? The steamboat should exercise her paramount right of navigation in a *bona fide* manner so as to do no unnecessary damage. Section 5203, L. O. L., recognizes this rule and declares a liability for an infraction thereof. These phases of the case were, we think, all properly submitted to the jury. As we understand the charge of the court the jury was informed that the steamboat had a right to navigate on any part of the river so long as it used reasonable care to prevent doing injury to plaintiff's boat, and net. It may be that when off the regular channel navigating where it would more likely come in close proximity to fishing boats and nets, a steamboat exercising the care that a reasonably prudent man

would exercise, would be required to be more vigilant than in a place where such craft and paraphernalia is less likely to be.

6, 7. Defendant's counsel requested the court to instruct the jury that, a boat engaged in navigation on a navigable stream is not obliged to stop or go out of her way or wait on the movements of those managing a seine or net.

This request might have been understood by the jury as giving the steamboat the right to proceed on her course on the river without any regard or care for the rights of the plaintiff fisherman, whether or not there was any necessity for taking a course, which would menace or destroy the small boat. If those in charge of the "Maria" saw the plaintiff's boat or net, or were warned that the steamboat was approaching the same, it was their duty to change her course if that could be done without prejudice to the reasonable prosecution of her voyage. There was no error in refusing to charge the jury as requested: See Gould on Waters (3 ed.), § 87. Defendant also complains that the court did not charge the jury, that the master of a vessel is not required to yield the channel to a fishing net. It does not appear from the record that the plaintiff's boat or fishing net was in the channel. If it had been, a different question would have been presented and an instruction in regard thereto would have become important: See *Hopkins* v. *Norfolk & S. R. Co.*, 131 N. C. 463 (42 S. E. 902).

Finding no error in the record the judgment of the lower court is affirmed. AFFIRMED.

McBRIDE, C. J., MOORE and JOHNS, JJ., concur.

Argued June 26, affirmed July 23, 1918.

FIRST SAVINGS BANK OF ALBANY v. LINNHAVEN ORCHARD CO.

(174 Pac. 614.)

Payment—Pleading Time of Payment.

1. An answer setting out a contract to sell real estate upon which "defendants have paid the amount herein mentioned, to wit," followed by a statement of the name of each purchaser, description of land, date of contract, purchase price, and "amount paid" in dollars, does not fix the date of payments.

Vendor and Purchaser—Remedies of Purchaser—Lien for Purchase Money.

2. A purchaser under a contract for the sale of real property has a lien on the property for the purchase price paid, which, upon breach by the vendor, can be enforced by a decree ordering the sale of the property.

[As to lien of vendee, see note in 127 Am. St. Rep. 873.]

Mortgages—Priorities—Lien of—Purchaser of Property.

3. One who asserts the priority of a purchaser's lien on real property against subsequent purchasers and a mortgagee must show that the payments upon which his lien attaches were made prior to the mortgage or other liens.

Mortgages—Priorities—Lien for Purchase Money.

4. In an action between the holder of a purchase-money lien and a mortgagee to determine priorities in real property, where the lienholder fails to allege that the payments under which he claims were made prior to the mortgage, it is not necessary for the mortgagee to show, under Section 7129, L. O. L., that the mortgage was acquired in good faith.

From Linn: William Galloway, Judge.

Department 2.

The plaintiff brings this suit to foreclose three certain mortgages upon the tracts of land described in the complaint executed on May 8, 1911, to secure the payment of two promissory notes aggregating $14,500. One of the mortgages was duly recorded in the records of Linn County on June 10, 1911. Another was placed on record October 14, 1911, and the third was made a matter of record on October 15, 1911.

The defendant being in default in the payment of interest, a decree was rendered foreclosing the mortgages and declaring them to be prior to the liens asserted by any of the defendants.

Charles Leonard, B. F. Raines, John Edwards and A. W. Smith were made defendants in the suit. B. F. Raines filed an answer and cross-complaint setting forth an attachment lien upon the land involved made on March 20, 1915, and a judgment thereafter rendered and docketed in the Circuit Court for Linn County perpetuating the attachment lien. John Edwards and Charles Leonard answered asserting a judgment lien, which was docketed in that court on the fourth day of September, 1915.

Lydia L. Meyer, Alice C. Arzt, Frank Buehring, W. T. Franklin, Frank Rost, Elizabeth B. Page, J. J. Page, H. A. Noble, Andrew Torkelson, Tena Torkelson, W. E. Still, H. E. Still, W. H. Page, and Eustace Spence, defendants and appellants, by their answer claim an equitable lien upon certain tracts of land, being portions of the lands described in plaintiff's mortgages, by reason of certain contracts for the purchase of the same. These defendants allege,

"That the purpose of the organization and existence of the Linnhaven Orchard Company was to lay out, plat, put on the market and sell certain tracts of land located in Linn County, Oregon, and more particularly described as the Linnhaven Tracts, as the same appear from the duly recorded plat thereof on file in the office of the County Recorder for Linn County, Oregon."

That the Linnhaven Orchard Company made certain false and fraudulent representations in regard to the several tracts of land purchased by these defendants for the purpose of inducing them to purchase the certain tracts and then allege as follows:

"That thereafter defendant Linnhaven Orchard Company, by means of said false and fraudulent representations set forth and alleged above, sold to defendants mentioned herein, who here relying upon said representations as aforesaid made by the said defendant Linnhaven Orchard Company, did each for himself enter into a contract for the purchase of tracts in the said Linnhaven tracts for the prices herein set forth and upon which each of said defendants respectively has paid the amount herein mentioned, to wit:

Name.	Tract No.	Date of Cont.	Pur. Price	Amt. Paid.
Lydia L. Meyer.....	215	March 29, 1911	$3600	$1800.00
Alice C. Arzt	216	May 30, 1911	3600	1800.00
Frank Buehring	207	Jan. 18, 1911	3600	1800.00
W. T. Franklin	206	Oct. 1, 1912	4200	1200.00
Frank Rost	212	Jan. 14, 1911	3600	2400.00
Elizabeth B. Page.....	178	Dec. 14, 1910	3600	2400.00
Elizabeth B. Page.....	213	Dec. 6, 1910	3600	1800.00
H. A. Noble.....	20	Oct. 24, 1910	3600	3600.00
H. A. Noble.....	26	March 1, 1911	3600	1200.00
Andrew Torkelson } Tena Torkelson }	22	Sept. 1, 1911	4200	1200.00
W. E. Still } H. E. Still } 181-133-134		May 8, 1911	9800	5400.00
W. H. Page.....	208	May 8, 1913	4200	1000.00
Eustace Spence	179	Oct. 8, 1913	4200	600.00"

That each of the contracts for the purchase and sale of said tracts was evidenced by a written contract, whereby the defendant Linnhaven Orchard Company agreed to sell to the purchaser therein named the tracts of land therein described and to execute and deliver to the purchaser, or his heirs, a good and sufficient warranty deed, accompanied by an abstract showing a perfect title in the grantor, upon the completion of the payments provided for in the contract, and to perform the other stipulations of the contract.

That on account of the failure of the Linnhaven Orchard Company to comply with the terms of said contracts, and its inability to convey a good title as

agreed, "each of said defendants has refused to make further payments upon his or her said contract and has rescinded the same."

That the liens of these defendants as to the particular tracts upon which said liens exist, are prior to the lien and claim of plaintiff herein, "said lien and claim of each of said defendants being as of the date of the contract of said defendants."

It was stipulated that the answers be deemed denied and replied to.

The trial court decreed the purchasing defendants to have a lien subsequent in time and inferior in right to plaintiff's mortgages, and subsequent to the lien of the judgments mentioned. These purchasing defendants appeal. Affirmed.

For appellants there was a brief over the names of *Mr. John McCourt, Mr. Samuel M. Endicott* and *Mr. Walter C. Winslow,* with an oral argument by *Mr. McCourt.*

For respondents there was a brief over the name of *Messrs. Weatherford & Weatherford,* with an oral argument by *Mr. James K. Weatherford.*

BEAN, J.—1, 2. There is no allegation as to the time of payments on the contracts of purchase contained in the answer of these defendants except as shown above: *Title Ins. & Trust Co.* v. *Northwestern Long-Distance Telephone Co.,* 88 Or. 666 (173 Pac. 251). It will therefore be seen that no dates of such payments are fixed. The payments for which the purchasing defendants claim a lien may have been made at any time between the dates of their respective contracts, and the time when they each ceased making payments, which is not definitely stated. According to the weight

of authority, a purchaser of real estate has, in equity, a lien upon the real property for the amount of the purchase price paid upon a contract for the purchase thereof. Where the executory contract fails by reason of the vendor's default, and without any fault of the purchaser, such lien will be enforced by decree, for the sale of the property: *Howard* v. *Linnhaven Orchard Co.*, 228 Fed. 523; *Tyler* v. *Cate*, 29 Or. 515 (45 Pac. 800); 39 Cyc. 2031, and note.

3. The appealing defendants invoked the rule that as between a mortgage of real property and other liens or claims, which may attach as liens upon the premises, the general rule is that, that which is first in time is first in right: 27 Cyc. 1171, and note 46. Also that this lien of the purchaser exists as against subsequent purchasers, or mortgagees with notice of the payment: 39 Cyc. 2040, and note.

In order for the appealing defendants to be benefited by this equitable rule, it was incumbent upon them to allege and prove as a basis for their claim that the payments made by them upon their respective tracts of land were made prior to plaintiff's mortgages, or prior to the other liens.

These defendants are not claiming an equitable right to purchase the land, by virtue of their contracts to purchase, but assert an equitable claim of lien by reason of the partial payments made for the tracts of land. Therefore, their equities would arise, not at the time of the execution of the contract as alleged in their answer, but at the time of the partial payments made by them.

4. Section 7129, L. O. L., provides:

"Every conveyance of real property within this state hereafter made, which shall not be recorded as provided in this title within five days thereafter, shall be void against any subsequent purchaser in good

faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

Before the plaintiff would be required to show that its mortgages were acquired in good faith, without knowledge or notice of the equities of the appealing defendants, it would be necessary for such defendants to allege that the payments for which they claim an equity were made prior to plaintiff's mortgages.

Defendants and appellants have not done this, and therefore have not brought themselves within the rule announced in the cases of: *Baker* v. *Woodward,* 12 Or. 3 (6 Pac. 173); *Raymond* v. *Flavel,* 27 Or. 219 (40 Pac. 158); *Rhodes* v. *McGarry,* 19 Or. 222 (23 Pac. 971); *Barnes* v. *Spencer,* 79 Or. 205, 214 (153 Pac. 47).

The question here involved, as to the dates of the payments upon these contracts, is identical with that discussed by Mr. Justice Benson in the case of *Green* v. *Linnhaven Orchard Company et al.,* in which an opinion has this day been rendered, to which reference is hereby made. It is shown that the plaintiff's mortgages were executed by the Orchard Company to secure a loan of $14,500, of which $9,500 was obtained to satisfy prior mortgages given for the purchase price of the land. The loan was made, and the security taken in good faith.

It follows that the decree of the lower court must be affirmed, and it is so ordered. Affirmed.

McBride, C. J., Benson and Johns, JJ., concur.

Argued February 28, reversed and remanded March 19, sustained on rehearing July 30, 1918.

FEENEY & BREMER CO *v.* STONE.*

(171 Pac. 569, 174 Pac. 152.)

Sales—Breach of Warranty—Reliance and Inducement.

1. In action for breach of warranty, plaintiff must show that the warranty was relied on and that it was an operative cause, although it need not have been the sole inducement.

Sales—Pleading—Breach of Warranty.

2. In action for breach of warranty of personal property, the purchaser must allege he relied upon the warranty and was thereby deceived.

Sales—Rescission—Breach of Warranty—Return of Property.

3. The purchaser of a machine may rescind the contract and return the machine within a reasonable time after delivery, if it is not as warranted.

Sales—Contracts—Remedies of Purchaser.

4. Generally, in a contract of sale, in the absence of language evidencing an intention to make a given remedy, such as a right given to the purchaser to retain without charge the article, if not as warranted, exclusive of all others, such remedy will be deemed cumulative and permissive rather than exclusive and mandatory.

[As to remedies of vendee for breach of warranty of quality, see note in 54 **Am. Dec.** 146.]

Sales—Warranty—Remedies of Purchaser.

5. A purchaser's right to proceed on the warranty in his sale contract was not destroyed by the seller's agreement that if the property sold were not as warranted the purchaser could keep it without paying for it, especially when the purchaser waived any right arising out of the promise not to charge and sued on the warranty.

Sales—Breach of Warranty—Damages.

6. When the seller of personal property has breached his express warranty to furnish an article of a specified kind, quality or condition, he is liable, as in the case of any other kind of a contract, for both general and special damages.

Sales—Breach of Warranty—Effect of Acceptance.

7. Acceptance of property sold does not of itself preclude the buyer from recovering damages for breach of warranty.

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*On construction of provision for return on the event of rescission for breach of warranty, see note in 32 **L. R. A. (N. S.)** 212.

As to profits lost in consequence of breach of warranty of machinery purchased for vendee's use as element of damage, see note in 2 **B. R. C.** 79.

On loss of profits as element of damages for breach of warranty, see note in 52 **L. R. A.** 233, 240. REPORTER.

Damages—Breach of Warranty—Reduction of Damages.

8. In case of breach of warranty in a contract of sale, the buyer owes an active duty to exercise ordinary care to keep the damages as low as possible.

Sales—Breach of Warranty—Damages—Expenses.

9. If buyer of a machine was obliged, because the machine bought did not work, to rent another machine to prevent loss to himself, he was entitled to reimbursement from the seller to the extent such expense was extra in character and reasonable in amount.

Sales—Breach of Warranty—Anticipated Profits.

10. The theory of the law being to award compensation for gains prevented and losses sustained, and anticipated profits not being non-recoverable merely because they are such, if it is reasonably certain that the breach of a contract has deprived the complaining party of a profit which was contemplated or can reasonably be presumed to have been contemplated by the parties at the time the contract was made, then the party committing the breach is liable for the loss of the profit.

Sales—Breach of Warranty—Special Damages.

11. In order to recover special damages for a breach of warranty, the buyer must allege and prove that the special damages claimed by him are such as were contemplated, or may reasonably be said to have been contemplated, by the parties at the time they made the contract.

Sales—Special Damages—Loss of Profits.

12. If at the time of sale of a hoist the seller did not know that the buyer intended to use it in the sale of gravel to the public, the buyer could not recover loss of profits on account of the seller's breach of warranty of the hoist, since it could not be said the parties contemplated such loss as a result of breach.

ON REHEARING.

Sales—Breach of Warranty—Anticipated Profits.

13. In action for price of machinery to be used in loading gravel, defended on ground of breach of warranty, the purchaser could not recover anticipated profit on mere allegation that he could have sold the gravel, in the absence of showing that he had definitely contracted to that effect; the damages being too remote.

Pleading—Demurrer—When Proper.

14. Where answer, in action for price of machinery, disclosed breach of warranty, sought recovery for special damage for loss of profits, but failed to set out the facts entitling defendant to recover therefor, the plea was nevertheless not demurrable, being good for at least nominal damages, and the proper method of attack was by objection to the evidence.

Sales—Breach of Warranty—Damages.

15. Where defendant purchased machinery for loading gravel, but because of breach of warranty of the machinery was prevented from selling the gravel or handling it, since he still had the gravel, his measure of damages was the difference between the contract and the market price of the gravel, constituting the profit which he lost.

From Tillamook: GEORGE R. BAGLEY, Judge.

Department 1. The plaintiff Feeney & Bremer Company, a corporation, operates a metal foundry and manufactures machinery. The defendant has a gravel-bar and, since August 1, 1915, has been engaged in the business of selling gravel. The complaint alleges that between July 1, 1915, and January 26, 1916, the plaintiff delivered certain materials and performed services for the defendant of the reasonable value of $591.43; that $301 has been paid; and that $290.43, the unpaid balance, is due. Among the items appearing in the itemized statement, attached to the complaint, is a drum-hoist valued at $450. The controversy between the litigants relates to the hoist and consequently no further notice will be given to the other items mentioned in the pleadings.

For a defense the answer avers that on or about July 1, 1915, the defendant was negotiating with manufacturers for an electric hoist to be used in hoisting gravel into bunkers and that at the same time he was negotiating with the Coast Power Company of Oregon for electricity with which to operate such a hoist; that while the defendant was negotiating the plaintiff approached the defendant and requested him to purchase a hoist from the plaintiff and

"offered and agreed to construct for the defendant such a hoist as defendant required in his said business, and agreed that if the defendant would give the plaintiff an order for the said hoist, that the plaintiff would construct such a hoist, and expressly guaranteed that if such order were given to plaintiff, that the hoist which the plaintiff would construct and deliver to defendant would be a hoist which would stand up to the work and accomplish the purposes of the defendant in that behalf in carrying on his business, and that if said hoist did not work, plaintiff would make the same do so, and if the machine would not work that plaintiff

would charge the defendant nothing therefor." The defendant alleges that "in consideration of the representation and guarantee of the plaintiff as aforesaid, the defendant agreed to purchase from plaintiff the drum hoist referred to, at the agreed price of $450, but in consideration of the said representations, agreement and warranty of the plaintiff in regard thereto as aforesaid."

It is averred in the answer that the plaintiff constructed and delivered an electric hoist but that it was faultily constructed; "that the same would not stand the work required to be done thereby by the defendant and which was contemplated by the parties," and that "the reasonable value of said hoist so furnished was no more than the sum of $100," although it would have been worth $450 if it had been built in full compliance with the agreement.

The defendant also pleads a counterclaim. He avers that the hoist was first delivered to him in July, 1915; that he began using it on August 1, 1915, and although the "machine frequently gave way" he continued to operate it until August 24, 1915, when it "completely broke down"; that he

"thereupon requested plaintiff to repair the same so that it would work as had been agreed, but the plaintiff delayed repairing the same until on or about the 1st day of September, and by reason of said delay of the plaintiff the defendant was compelled to rent other equipment in order to operate his plant."

Continuing, the defendant alleges "that plaintiff did thereafter overhaul and put in repair the said hoist and redeliver the same to defendant," but that it has never been capable of doing the work contemplated by the agreement.

The defendant then avers:

"That in order to carry on the defendant's operations, on account of the failure of the said machine

so furnished by plaintiff to do the work represented to be done and guaranteed to be done by said machine, the defendant has been compelled to procure other machinery to operate his plant, and has necessarily expended on account thereof the following sums:

"For rent of donkey-engine.....$120.00;
"For labor in moving engine..... 59.00;
"For fuel for operating donkey-engine..... 124.95;
"For extra labor for operation of donkey-engine .....100.00"

It is also alleged that because "of the incapacity of the said hoist to properly perform" during the month of August he lost a profit of 50 cents per yard on 500 yards of gravel which he could have sold to the Arenz Construction Company and a profit of 20 cents per yard on 340 yards of gravel which he could have sold to Tillamook County.

There was a verdict and judgment for the defendant for $355 and the plaintiff appealed.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Sidney S. Johnson* and *Mr. T. B. Handley,* with an oral argument by *Mr. Johnson.*

For respondent there was a brief and an oral argument by *Mr. H. T. Botts.*

HARRIS, J.—Briefly stated, the defendant contends that he is entitled to have the price of the machine reduced to $100 and that he is also entitled to special damages: (1) For the expense of the donkey-engine; (2) for profits which he lost by reason of his inability to furnish gravel in the month of August to the Arenz Construction Company and to Tillamook County. There is no claim of any loss of profits except for the month of August.

The plaintiff contends that the judgment should be reversed because: (1) The answer does not contain an affirmative allegation that the defendant relied upon the warranty pleaded by him; (2) the warranty is limited to and extends no further than the stipulation that the "plaintiff would charge the defendant nothing" if the hoist did not work; (3) partial failure of consideration was the only defense available to the defendant; and (4) the damages mentioned in the counterclaim were not within the contemplation of the parties and are too remote and speculative and therefore not recoverable.

1, 2. In order to maintain an action for a breach of warranty it must be shown that the warranty was relied upon; and although the warranty need not have been the sole inducement it must have been an operative cause: 35 Cyc. 376; 2 Mechem on Sales, §§ 1234, 1235; and, therefore, in an action for a breach of warranty the purchaser of personal property must allege that he relied upon the warranty and was thereby deceived: *Abilene Nat. Bank* v. *Nodine*, 26 Or. 53, 55 (37 Pac. 47); 35 Cyc. 450. The defendant insists that this rule of pleading is satisfied by the following allegation appearing in the answer:

"In consideration of the representation and guarantee of the plaintiff as aforesaid, the defendant agreed to purchase from plaintiff the drum hoist referred to, at the agreed price of $450, but in consideration of the said representations, agreement and warranty of the plaintiff in regard thereto as aforesaid * * ."

It is intimated in *Lincoln* v. *Ragsdale*, 7 Ind. App. 354, 356 (31 N. E. 581), that the quoted allegation would be sufficient. While the averment lacks directness and positiveness nevertheless it might possibly be adequate after a verdict and judgment, since, so

far as the record discloses, the objection was not made in the lower court but is made here for the first time. The judgment should be reversed for other reasons, however, and all doubts concerning the sufficiency of the pleading may be removed by the filing of an amended answer.

3–5. The answer avers that the plaintiff "expressly guaranteed" that if the hoist "would not stand up to the work and accomplish the purposes of the defendant" and that if the hoist did not work "plaintiff would make the same do so, and if the machine would not work the plaintiff would charge the defendant nothing therefor." The plaintiff argues that the parties have by the agreement, alleged in the answer, limited the defendant's remedy for a breach of the warranty to the right to decline to pay for the machine, and that, therefore, Stone is not entitled to recover damages for a breach of the warranty. If by the stipulation "the plaintiff would charge the defendant nothing therefor" is meant that the defendant could refuse to accept the hoist, then the stipulation added nothing to the rights of the defendant since the law gave him the right to rescind the contract and return the machine within a reasonable time after delivery, for it must be remembered that the parties contracted for a machine which was not yet in existence when they made the agreement: *Steiger* v. *Fronhofer,* 43 Or. 178, 183 (72 Pac. 693); *Lenz* v. *Blake,* 44 Or. 569 (76 Pac. 356). If, on the other hand, the parties intended to agree that the defendant could keep the hoist without paying for it if it did not work, it constituted an additional rather than an exclusive remedy. Generally speaking, the parties to a contract for the sale of personal property have a right to agree that a defined remedy shall be exclusive; but in the absence of language evidencing an intention to make a given

remedy, like the one in question here, exclusive of all others, it is treated as cumulative and permissive rather than exclusive and mandatory; and hence the buyer is usually permitted to avail himself of the special remedy; or, if he chooses, he may accept the property and recover damages for a breach of the warranty. There is nothing to indicate that the parties intended that the right not to pay should be the exclusive remedy. It is not necessary to determine whether Stone could have returned the property and also recover damages for a breach of the warranty, for the reason that he elected to keep the hoist, and as ruled in *Douglass Axe Mfg. Co.* v. *Gardner,* 10 Cush. (64 Mass.) 88:

"The buyer has, if not a double remedy, at least a choice of remedies, and may either return the property within a reasonable time, or keep it and maintain an action for breach of the warranty."

The warranty was not rescinded, violated or destroyed by the stipulation not to charge, especially when the defendant waives, as he has done, any right arising out of the promise not to charge and sues on the warranty: *Sanford* v. *Brown Bros. Co.,* 208 N. Y. 90 (101 N. E. 797, 50 L. R. A. (N. S.) 778); *Nave* v. *Powell,* 52 Ind. App. 496 (96 N. E. 395); *McGill* v. *Hall* (Tex. Civ.), 26 S. W. 132; *Fitzpatrick* v. *D. M. Osborne & Co.,* 50 Minn. 261 (52 N. W. 861); *Aultman M. & Co.* v. *Theirer,* 34 Iowa, 272; *Gaar, Scott & Co.* v. *Patterson,* 65 Minn. 449 (68 N. W. 69); *Obenchain* v. *Roff,* 29 Okl. 211 (116 Pac. 782); *Battey* v. *Lunt M. & Co.,* 30 R. I. 1 (73 Atl. 353, 136 Am. St. Rep. 926); 2 Mechem on Sales, § 1801; 35 Cyc. 438.

The remaining assignments of error relate to the measure of damages. The rule for measuring damages for the breach of a contract is found in the celebrated English case of *Hadley* v. *Baxendale,* 9 Exch.

341, and in the subsequent but equally noted American case of *Griffin* v. *Colver,* 16 N. Y. 489 (69 Am. Dec. 718). In the former case the court states the rule in the following language:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

Continuing further, the reasons are given thus:

"Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus actually known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily flow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

Although employing different language, the American case announces the same rule, for we find the doctrine stated thus in *Griffin* v. *Colver,* 16 N. Y. 489, 494 (69 Am. Dec. 718):

"The broad general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed."

In 2 Mechem on Sales, Section 1757, the author restates the rule established by *Hadley* v. *Baxendale* and *Griffin* v. *Colver,* in this manner:

"The party who has broken his contract is liable to make compensation to the other for all such losses resulting from that breach as are either (1) The ordinary, the usual, the commonly to be expected consequences of such a breach of such a contract; or (2) the peculiar or unusual consequences of the breach of the particular contract in question, if, under the circumstances, it can fairly be said that both parties had those consequences in their contemplation, at the time the contract was made, as a probable result of its breach; and if those unusual consequences are neither uncertain in their nature nor remote as to their cause."

6–8. When the seller of personal property has breached his express warranty to furnish an article of a specified kind, quality or condition, he is liable, as in the case of any other kind of a contract, for both general and special damages: 2 Mechem on Sales, §§ 1817, 1821; 35 Cyc. 451, 465; 30 Am. & Eng. Ency. Law (2 ed.), 209, 214. The acceptance of the property does not of itself preclude the buyer from recovering damages: *Cassidy* v. *Le Fevre,* 45 N. Y. 562. As in other contracts, the buyer owes an active duty to exercise ordinary care to keep the damages as low as possible;

30 Am. & Eng. Ency. Law (2 ed.), 223; *Wright* v. *Computing Scale Co.*, 47 Wash. 107 (91 Pac. 571).

9. If the defendant was obliged to rent the donkey-engine in order to prevent loss to himself then, to the extent that such expense was extra in character and reasonable in amount, the defendant is entitled to reimbursement: *Drake* v. *Sears*, 8 Or. 210, 213; *Hoskins* v. *Scott*, 52 Or. 271, 279 (96 Pac. 1112); *People's Savings Bank* v. *Waterloo & Cedar Falls R. T. Co.*, 118 Iowa, 740 (92 N. W. 691); *Optenberg* v. *Skelton*, 109 Wis. 241 (85 N. W. 356); *Carroll-Porter Boiler & Tank Co.* v. *Columbus Mach. Co.*, 55 Fed. 451 (5 C. C. A. 190).

10, 11. The theory of the law is to award compensation for gains prevented and for losses sustained. The party who is damaged by the breach of a contract is not prevented from recovering anticipated profits merely because they are such. If it is reasonably certain that the breach of a contract has deprived the complaining party of a profit which was contemplated or can reasonably be presumed to have been contemplated by the parties at the time the contract was made then the party committing the breach is liable for the loss of the profit: *Drake* v. *Sears*, 8 Or. 209, 214; *Hoskins* v. *Scott*, 52 Or. 271, 276 (96 Pac. 1112); *Fields* v. *Western Union Tel. Co.*, 68 Or. 209 (137 Pac. 200); *McGinnis* v. *Studebaker Corp.*, 75 Or. 519, 522 (146 Pac. 825, 147 Pac. 525, Ann. Cas. 1917B, 1190, L. R. A. 1916B, 868). The rule is illustrated in the following cases where the complaining party was not permitted to recover profits claimed to have been lost on account of a breach of warranty: *Weybrick & Co.* v. *Harris*, 31 Kan. 92 (1 Pac. 271); *Puget Sound Iron & Steel Works* v. *Clemmons*, 32 Wash. 36 (72 Pac. 465); *Wright* v. *Computing Scale Co.*, 47 Wash. 107 (91 Pac.

571); *Blymer Ice Machine Co.* v. *McDonald,* 48 La. Ann. 439, 449 (19 South. 459); *Moulthrop* v. *Hyett,* 105 Ala. 493 (17 South. 32, 53 Am. St. Rep. 139). The following are examples of cases where the buyer was permitted to recover profits which he lost by reason of the breach of the seller's warranty: *The Crompton & Knowles Loom Works* v. *Hoffman,* 5 Ont. L. Rep. 554; *Murray Co.* v. *Putman,* 61 Tex. Civ. App. 517 (130 S. W. 631); *Alamo Mills Co.* v. *Hercules Iron Works,* 1 Tex. Civ. App. 683, 688 (22 S. W. 1097). Some of the language employed in *Alamo Mills Co.* v. *Hercules Iron Works, supra,* is so apropos that we here quote from the opinion of the court:

"The right, or not, to recover profits for a breach of a contract, does not depend upon an arbitrary rule to be adopted by a court, but upon the principles that should control the right. The law does not condemn profits, as such, as a measure of damages. The question is, would the loss of profits be the direct result of the breach, and would such loss 'reasonably be supposed to have entered into the contemplation of the parties at the time of making the contract?' Conjectural profits would not be allowed, not for the reason that profits are proscribed, but because they are uncertain. If they become sufficiently certain, are the direct result of the breach, and the parties were in possession of such facts as would charge them, as reasonably intelligent men, with the probable consequences of the breach, then profits fall within the rule, and may be recoverable as damages."

In order to recover special damages for a breach of warranty the buyer must allege and prove that the special damages claimed by him are such as were contemplated or may reasonably be said to have been contemplated by the parties at the time they made the contract: 35 Cyc. 451. It will be necessary now to direct attention to the evidence.

The bill of exceptions contains a narrative of the testimony given by the defendant, and instead of saying that the defendant testified to this or to that we shall, for the purposes of the appeal, give an affirmative statement of the facts on the assumption that the facts are exactly as testified to by the defendant. However, it must be understood that we do not attempt to decide any question of fact. The plaintiff learned that Stone wished to purchase a hoist to be used in raising gravel into bunkers, and inquired of Stone "what the chance was for building that double drum-winch." The plaintiff "was warned how this winch had to be built" and was told that "on account of the high speed of the machine necessary to do the work that he [the plaintiff] had to put bronze brass bushings in the bearings in order to do the work." The parties "discussed that it [the machine] was to be used with overhead lines and bucket; yard and a half bucket was to be used." The plaintiff "agreed to build a hoist there that would do—that would work perfectly —for $450"; and "if it did not do the work he [the plaintiff] would make it do the work or it would not cost us [the defendant] anything."

The plaintiff constructed a machine; it was delivered to Stone in July but he "did not start to use it until August 1st." The defendant "commenced raising gravel" but he "never could raise over half a bucket." "The bolts were not big enough"; the frictions were made of green spruce when they should have been "good oak or hickory"; the thrust-bearings were small "where they should be large"; Stone asked the plaintiff "time and time again to come down and overhaul it and put in thrust-bearings"; but the plaintiff "never did come down." Finally on August 24th "the pullback drum froze right on the shaft" because of defects in the machine. Stone immediately notified

the plaintiff. Feeney & Bremer Company had the machine "down here in the shop" but delayed making the necessary repairs. "The Arenz Construction Company was on the county work and needed rock and gravel bad"; the county "needed gravel bad"; Stone told the plaintiff that he was going to hire a donkey-engine if the plaintiff did not repair the damaged hoist; and finally on or about August 29th the plaintiff commenced to work on the machine. The plaintiff did not redeliver the hoist until June or July, 1916. Stone rented and installed a donkey-engine. While the record does not disclose the exact date it may be inferred that the donkey-engine was ready for operation possibly on August 30th, and Stone continued to use it for about six weeks. "If the hoist had worked according to contract" Stone would "not have been out a nickel on any" of the expense incurred for the donkey-engine.

"Along about the 25th of August" the road supervisor came to Stone and stated that he was going to build a certain road and that he would take gravel from the defendant at thirty-five cents per yard. The Arenz Construction Company was building a pavement "and the county was furnishing the crushed rock" and the defendant "was to put in the gravel." The defendant "could put in half gravel and possibly a little more if the county could not furnish crushed rock." The defendant "was getting $1.65 for the gravel from the Arenz Construction Company" and was realizing "about 70 cents a yard profit" when using the electric hoist while the profit was only 60 or 65 cents a yard after the installation of the donkey-engine. The county road supervisor "came there on August 28th and got 8 yards"; the donkey-engine was not yet ready for use although it was being installed and hence the defendant could not furnish any more

gravel and he told the road supervisor "to go in on the bar and get it, and they went in on the bar and loaded 337 yards, which I could have furnished them if the donkey had been working."

If the defendant is entitled to recover for a loss of profits his right is limited to the loss of profits which he could and would have made on the deliveries to the county and the Arenz Construction Company. There is nothing in the testimony of the defendant to show that he lost any profits, so far as the Arenz Construction Company is concerned, between the 1st and 24th of August and he could not have lost any profits during that time so far as the county is concerned because the road supervisor did not speak to him about gravel until August 25th, and the county did not call for gravel until August 28th. While the evidence does not disclose the exact date when the donkey-engine was ready for installation, it is fair to presume that it could have been operated possibly as early as August 30th and probably not later than September 1st. According to the testimony of the defendant himself the donkey-engine "did the work excellently all the time we had it," and, therefore, the fair inference is that the defendant was able to work the bucket to full capacity. It does not affirmatively appear from the testimony of the defendant whether any of the 337 yards of gravel taken by the county was taken after the donkey-engine was ready for operation; but if the county took any of that gravel after the donkey-engine was ready for operation the defendant is not entitled to claim a loss of profits on the gravel so taken. The same rule applies to the Arenz Construction Company. The defendant does not say affirmatively that he did not deliver any gravel after August 24th to the Arenz Construction Company. The defendant cannot claim damages for alleged lost profits

on gravel delivered to the Arenz Construction Company after the donkey-engine was installed.

The answer speaks of a contract for electric power; and the defendant testified about the same subject. However, the defendant did not say that he did in fact make a contract for electric power binding himself to pay for electricity whether he used it or not. He cannot charge for electricity unless he became liable for it.

12. If the defendant lost profits on account of the breach of warranty then it may be conceded that such a loss was the proximate consequence of the breach of warranty; and yet it is not enough for the complaining party merely to prove that the loss was the proximate consequence of the breach, for he must also allege and prove that the loss was within the contemplation of the parties or that it can reasonably be said to have been within the contemplation of the parties at the time they made the contract for the hoist. It is true that the evidence shows that the plaintiff agreed to build an electric hoist that would do the work of running a yard and a half bucket which was to be operated with overhead lines; but the evidence does not sufficiently show that the plaintiff knew that the buyer intended to use it in supplying gravel to the public. If the seller did not know that the buyer intended to use the hoist for the purposes of selling gravel, it could not be said that the parties contemplated the loss which the buyer claims he sustained: *Puget Sound Iron & Steel Works* v. *Clemmons,* 32 Wash. 36 (72 Pac. 465). If the plaintiff knew that the defendant intended to use the hoist for the purpose of delivering gravel to the public then the parties contemplated that a breach of warranty would result in a loss to the defendant.

If the defendant lost profits on account of being unable to deliver gravel to the county and to the Arenz Construction Company the loss would be the proximate consequence of the breach and since the loss can reasonably be said to have been within the contemplation of the parties at the time they made the contract and the profits are not conjectural but are capable of being ascertained, the defendant is entitled to compensation: *Fields* v. *Western Union Tel. Co.*, 68 Or. 209 (137 Pac. 200). A careful examination of the record presented here leads us to the conclusion that justice requires a reversal of the judgment; and it is therefore ordered that the cause be remanded for a new trial. REVERSED AND REMANDED.

McBRIDE, C. J., BURNETT and BENSON, JJ., concur.

Former opinion sustained July 30, 1918.

ON REHEARING.

(174 Pac. 152.)

In Banc.

On rehearing. Former opinion sustained.

For appellant there was a brief submitted by *Messrs. Johnson & Handley.*

For respondent there was an oral argument by *Mr. H. T. Botts.*

BURNETT, J.—The principal error assigned by the plaintiff was the admission of testimony about the loss of profits which the defendant claimed he might have made in furnishing gravel to the Arenz Construction Company and Tillamook County if the hoist in

question had performed as the plaintiff contracted it should. The former opinion reversing the judgment was framed in part upon the assumption that the bill of exceptions contained all of the evidence in the case. The petition for rehearing points out that this is erroneous and that although the stipulation attached to the bill declares that it is a correct statement of the testimony of the defendant, as well as a true statement of the objections opposed thereto, yet it does not indeed give all the testimony in the case, and the argument is that we should presume that other evidence was received at the trial upon which the verdict properly could be founded. Because of depending on this mistaken hypothesis we awarded a rehearing. A careful re-examination of the case leads us to the conclusion that the defect in the defendant's case is more deep-seated than in the mere testimony.

13, 14. The answer says that the hoist "completely broke down" on August 24, 1915, and that the defendant procured other machinery to operate his plant at an expense of $403.95. In other words, he equipped himself with other machinery at that cost. Respecting the loss of profits the averment of his answer is as follows:

"That the defendant has further been damaged by failure of the said machine so furnished by plaintiff to perform the work agreed in that solely by reason of the incapacity of the said hoist to properly perform, the defendant lost the sale of 500 yards of gravel which he could have sold during the month of August, 1915, to Arenz Construction Company, a corporation, and defendant would have sold at a profit of 50¢ per yard, and the quantity of 340 yards of gravel which defendant could and would have sold during said period to Tillamook County, Oregon, at a profit of 20¢ per yard."

By this quoted allegation he seeks to add to the cost of the machinery and so increase his damage. He does not say that either the Construction Company or the county applied to or contracted with him to take gravel, nor does he show but that it was while he was using the substituted plant he lost the sales mentioned. His statement on that feature is a mere conclusion and does not by averment of facts connect the loss of sales with the failure of the hoist. His mere expectation that the county and the other party would apply to him for gravel manifestly would not be a basis for damages. He must go further and show that they actually contracted to buy from him a specified quantity of that material at a stated price, or that in good faith they offered to make such an agreement and that he was compelled to decline the offer because the hoist in question would not do the work. Besides this, if at that time he had procured the new machinery his loss of profits on a deal with the parties could not be attributed to the defect in the hoist furnished by the plaintiff. He could make the same profits by using the substituted machinery. In brief, the answer discloses that the defendant is keeping the hoist which the plaintiff sold him, yet trying to collect the price of a substitute as well as damages for loss of profits, without showing that he had any contract or offer to contract in good faith whereby he could have realized any gain. As he states his case in that feature, the loss of profits is too remote to be considered as an element of damage. In *Hoskins* v. *Scott,* 52 Or. 271, 277 (96 Pac. 1112), the plaintiff sought to recover for loss of profits he would have made during the threshing season with his machine if the defendant had performed its agreement to furnish him a competent engineer and a suitable engine with which to supply power to his thresher. He gave evidence that there

were large areas of grain in the neighborhood where he operated, which he could have threshed if he had had the engine agreed upon, but did not show that he had contracted with any particular persons, and the Court, speaking by Mr. Commissioner KING, said:

"Enforceable contracts should have been shown from which the quantity of grain he would probably have threshed, including probable losses, with reasonable certainty could have been estimated. Otherwise, the damages sought were too speculative to be entitled to consideration."

In *Dose* v. *Tooze,* 37 Or. 13, 16 (60 Pac. 380), Mr. Justice MOORE used this language:

"General damages are such as a party necessarily sustains from the wrong of which he complains and such as the law presumes would inevitably result from the act or omission of the adverse party causing the injury, and are recoverable under an averment in the complaint of plaintiff's pecuniary loss, without stating their particular nature: * * Special damages, however, do not necessarily result from the wrongful act or omission of the adverse party, but are such as may follow from them as a natural and proximate consequence caused by his negligence or design, and as the law does not presume that such an effect will inevitably follow, it is incumbent upon the plaintiff to allege specifically in the complaint the facts constituting his special damages in order that the adverse party may have notice thereof and be prepared for trial."

In *Blagen* v. *Thompson,* 23 Or. 239 (31 Pac. 647, 18 L. R. A. 315), the plaintiff had an actual contract for the purchase of some land the value of which he sought to enhance by engaging the defendants to build a car line to it, with a view to making it more accessible to the City of Portland and hence more desirable for suburban residences. All this the defendants knew and it was all averred in the pleadings. There was a

stated certainty that some damage, however uncertain in amount, would result from failure to build the road, and the court there said:

"The rule that damages which are uncertain or contingent cannot be recovered, does not embrace an uncertainty as to the value of the benefit or gain to be derived from the performance of the contract, but an uncertainty or contingency as to whether such gain or benefit would be derived at all. It only applies to such damages as are not the certain result of the breach and not to such as are the certain result, but uncertain in amount."

In the instant case, however, while a certain amount of loss of profits is mentioned, the statement leaves it uncertain whether there would have been any damage, for want of any covenant on the part of the county or the Construction Company to buy the defendant's gravel, or any valid offer on their part to purchase, which the defendant was unable to accept because plaintiff's hoist would not operate as represented. If he would recover from plaintiff upon this score, the defendant's relation to those from whom he would have realized gain must be as clearly shown as that to the plaintiff by whose default he claims to have been prevented from making a profit. It is not enough that he had prospects of contracting with the parties named. He must have had hold enough upon them to give rise to some degree of certainty within the meaning of the cases cited. His allegation of the contract and the breach of it entitles him to general damage, nominal or more, as the evidence may disclose. But if he would go further and recover special damage for loss of profits he must aver facts to which that measure of damages may be applied. This defect in the pleading could not be raised by general demurrer, for there is enough in the answer to show a contract and a

breach thereof from which accrue at least nominal damages. In this connection, in *Sunnyside Land Co.* v. *Willamette Bridge Ry. Co.*, 20 Or. 544 (26 Pac. 835), Mr. Justice BEAN used this language:

"If the allegations of the complaint in which plaintiff seeks to lay down the rule by which the damages are to be estimated are insufficient or irrelevant, the defect cannot be reached by demurrer, so long as the other parts of the complaint contain a sufficient statement. If these damages are sought to be recovered at the trial, the defendant may then object to the evidence. An erroneous claim of damages does not make a claim demurrable."

The bill of exceptions discloses that the plaintiff pursued this course, objecting to the introduction of testimony about profits on the ground, among others, that they were too remote, bringing them within the reason of the rule laid down in the excerpt from *Hoskins* v. *Scott*, 52 Or. 271 (96 Pac. 1112), and the objection should have been sustained under the then state of the pleadings.

15. Beyond all this, and also conceding for the moment that he had contracts with the company and the county, it is not shown that the defendant lost his gravel. He still has that property and for aught that appears could have sold it in the market to other persons at possibly an increased price. It is not like a contract for services which the complaining party was prevented from performing. Without having parted with the commodity, he is in a situation, so far as damages are concerned, analogous to that of a seller whose buyer refuses to take the goods for which he contracted. At least the defendant here could not recover more damage from the plaintiff on the score of lost profits than he could obtain from one to whom he had agreed to sell the gravel but who, having agreed to

buy, refused to take it at the time stipulated for delivery.

"The general rule is that the measure of damages when the buyer repudiates the contract and refuses to receive and accept the goods is the difference between the contract price and the market value of the goods at the time and place of delivery": 35 Cyc. 592.

The supposed case and the one stated by the defendant here are alike in the feature that in each the owner has been prevented from making sale of his goods and still has them on hand for all that appears. In either instance what would make him whole would be the difference between the agreed price, if he had a contract, and the lesser market value at the time and place of delivery: *Hockersmith* v. *Hanley,* 29 Or. 27 (44 Pac. 497); *Krebs Hop Company* v. *Livesley,* 59 Or. 574 (114 Pac. 944, 118 Pac. 165, Ann. Cas. 1913C, 758); *Russell Miller Milling Co.* v. *Bastasch,* 70 Or. 475 (142 Pac. 355). If he would recover on that score, the defendant should frame his pleading accordingly. For these reasons, we adhere to our former conclusion.

FORMER OPINION SUSTAINED.

Argued June 6, affirmed July 2, rehearing denied September 10, 1918.

O'NEILL *v.* ODD FELLOWS HOME.*

(174 Pac. 148.)

Statutes—Construction—General and Special Words.

1. Where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned, unless the legislative intent clearly appears to the contrary.

Master and Servant—Workmen's Compensation Act—Construction.

2. Employers' Liability Act (Laws 1911, p. 16), requiring the use of all precautions for safety of employees by persons in construction

*On construction and effect of Workmen's Compensation Acts, generally, see comprehensive notes in **L. R. A.** 1916A, 23, and **L. R. A.** 1917D, 80. REPORTER.

or repair of any structure, or operation of machinery, or manufacture or transmission of electricity or the use of any dangerous appliance or substance, or machinery or shafts, wells, floor openings and requiring all owners, contractors and other persons having charge of or responsible for any work involving a risk or danger to the employees, or the public to use every device, care and precaution which is practicable, did not render the employer liable when he furnished a step-ladder two or three feet high, not equipped with a hand-rail, or with other safeguards for use by a laundress hanging up washing, since the act applies only to employments beset with danger.

[As to occupations and employments within the purview of the Workmen's Compensation Act, see note in Ann. Cas. 1917D, 4.]

Charities—Charitable Institutions—Torts—Liability of Officers.

3. An action may be maintained against an officer of a charitable institution to recover damages for an injury caused by the negligence of such person, but the action must be against him in his individual and not in his corporate capacity, so that if a recovery is awarded it will not be discharged from the trust funds.

Charities—Liability—Torts.

4. Odd Fellows Home of Oregon, organized under Section 6796, L. O. L., providing that no such corporation shall ever use any of its resources for any other than charitable objects, cannot be held liable for injuries to a laundress working at the institution.

From Multnomah: George R. Bagley, Judge.

Department 2.

The complaint alleges in substance that the defendant is a corporation organized under the laws of the State of Oregon, and operating an establishment at East 2d and Holgate Streets, Portland, Oregon, as a home for members of the Independent Order of Odd Fellows.

"That on and prior to the 9th day of November, 1914, the plaintiff was employed as a laundress in said home or establishment maintained by defendant and known as the Odd Fellows Home of Oregon; that as a part of her duties, she was directed and required to hang washing upon lines fastened upon the porch of said home; that said lines were carelessly, recklessly and negligently stretched over a cement floor, the surface of which was hard, rough and irregular; that said lines were carelessly, recklessly and negligently placed by the defendant at such a high and unreasonable dis-

tance from the floor that it was necessary, in order to hang the washing upon said lines, to stand upon some portable object; that in order to enable the plaintiff to hang washing upon said lines, this defendant, by its Superintendent, on or about said 9th day of November, 1914, carelessly, recklessly and negligently directed this plaintiff to use a small portable wooden stepladder; that while plaintiff was descending said stepladder in the discharge of her duties, her skirt caught upon the top thereof, and on account of the dangerous and defective condition of said stepladder as hereinafter set out, became fastened thereon, and caused said ladder on account of its dangerous and defective condition as hereinafter set out, to move or shift by reason of which plaintiff was caused to and did fall from said ladder to the cement floor with great force and violence, and by reason thereof sustained injuries.

"That the stepladder furnished the plaintiff was a defective, dangerous and unsafe contrivance to be used for the purpose for which plaintiff was directed to and did use the same, in this: That said stepladder was light, narrow and unstable, without sufficient base, the effect of which was that it might and did shift and tip easily; that said stepladder was steep and declivitous and was not equipped with a handrail or other appliance whereby plaintiff might steady herself when using and standing upon the same; that the surface of the material composing said ladder was rough and unequal; that the edges thereof were rough, jagged and projecting, that said stepladder had no rubber nubs, weights or other safety devices upon the base or feet thereof to keep the same from shifting or slipping upon said concrete floor; that said stepladder was attached to no portable platform for a base thereof; that the surfaces of the material composing said ladder might and could have been made smooth and equal; that the rough, jagged and projecting edges of said ladder might and could have been removed therefrom; that a handrail or other appliance wherewith plaintiff might steady herself in using said step-

ladder, rubber nubs and movable platform thereto attached could have been constructed and maintained in connection therewith for plaintiff's use and protection; that defendant might and could have provided plaintiff with a movable platform resting upon an even, solid base, wherewith to reach the lines; that the said lines might and could have been lowered; that any and all of the foregoing precautions might and could have been taken by the defendant to protect and safeguard the life and limb of this plaintiff without interfering with the use of such ladder, platform or other device so to be used in the hanging of said washing, and without interfering with or depreciating the effect of the work in which plaintiff was engaged. That the work in which plaintiff was engaged involved a risk or danger to the plaintiff."

And alleges her damages in the sum of ten thousand ($10,000) dollars, and twenty-five ($25) dollars, doctor bills.

The defendant answered denying any negligence, and for a first, further and separate answer averred, that at the time of the injury, plaintiff selected from a number of stepladders at said home, a stepladder about two or three feet in height, consisting of two steps and a top, and constructed in a substantial manner; that plaintiff was wearing a narrow skirt, commonly called a hobble skirt, so that it hindered the plaintiff from stepping up or down; that after plaintiff had safely hung all of said clothes upon the line and while attempting to descend from the stepladder, the narrowness and tightness of the skirt hobbled and hampered the plaintiff in the use of her limbs in descending the ladder, and she was thereby caused to fall from the stepladder to the porch, and that plaintiff's injury, if any, was proximately caused by the wearing of such hobble skirt.

For a second and further defense, defendant avers that the injuries of plaintiff, if any, were suffered by reason of the wearing of a tight, hobble skirt, and the proximate cause thereof was the contributory negligence of the plaintiff.

For a third separate answer, defendant asserts that plaintiff realized and appreciated any danger or risk in attempting to step down from the ladder while wearing such hobble skirt, and assumed such risk.

For a fourth defense, defendant avers that plaintiff's fall from the stepladder was purely accidental without any negligence or fault on the part of defendant.

The reply put in issue all the affirmative defenses of the answer, except as alleged in plaintiff's complaint. After the jury was impaneled to try the cause, defendant by leave of court filed a fifth separate answer and defense as follows:

"I.

"That during all the time hereinafter mentioned, the defendant has been a Benevolent corporation, organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business at Portland, Oregon, and during all the times hereinafter mentioned, has been conducting and operating a home for the old men and women belonging to the Independent Order of Odd Fellows and for the orphan children of the members of said order, and for the benefit of the members of said order, and said home is known and designated as the Odd Fellows Home of Oregon.

"II.

"That said Odd Fellows Home is owned, operated and conducted without profit of any kind whatsoever, and is maintained by assessment made upon the lodges and membership of the State of Oregon and that the home and grounds above alleged and all of the money and property whatsoever is held by the Odd Fellows

Home in trust and not otherwise, for the maintenance, support and care of the old men and women of the order and for the maintenance, support, care and education of the orphan children of members of the order and for the purpose of caring for said old members and said children in sickness and furnishing them with medical attention, nurse and hospital services without any compensation therefor, and solely in a benevolent way and manner and without any profit whatsoever and that in carrying on said work and purposes, said Odd Fellows Home is a Benevolent and eleemosynary corporation and is trustee only and no more, for all of the property and all of its conducts and acts for the membership of said order in general in the state, and that therefore said Odd Fellows Home, as above alleged, is not liable in damages herein, and was such corporation at all of the times hereinbefore alleged."

The fifth further and separate defense being admitted by the plaintiff, no reply thereto was made. Whereupon the court rendered judgment for the defendant upon the facts admitted by the pleadings, as for want of a reply to the answer. The plaintiff appeals from such judgment. Affirmed.

For appellant there was a brief with oral arguments by *Mr. J. O. Stearns, Jr.*, and *Mr. Sidney J. Graham.*

For respondent there was a brief with oral arguments by *Mr. Henry S. Westbrook* and *Mr. Fred J. Meindl.*

BEAN, J.—This action is brought under the Employers' Liability Act, Laws of Oregon, 1911, p. 16, entitled,

An Act "Providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks and other structures, or engaged in any work upon or about electrical wires, or conduc-

tors or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or about any machinery or in any dangerous occupation and extending and defining the liability of employers in any or all acts of negligence, or for injury or death of their employees, and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employees against employers, and prescribing a penalty for a violation of the law."

While it is alleged in plaintiff's complaint that the work plaintiff was engaged in, at the time of the injury, involved a risk or danger to plaintiff, this of course is a conclusion which will depend upon the facts as set forth in the complaint. It will be noticed that the complaint asserts that the stepladder in question was light, narrow and unstable, without sufficient base; the weight, width or height is not stated. It is complained that the ladder was not equipped with a handrail or other appliance whereby plaintiff might steady herself. It is not alleged that the stepladder was more than twenty feet from the ground or floor so as to require the same to be "provided with a strong and efficient safety rail or other contrivance so as to prevent any person from falling therefrom," as provided in the employers' liability law, see clauses 15 to 19 of the act as outlined in *Camezind* v. *Freeland Furniture Company* in an opinion by Mr. Justice HARRIS, rendered June 18, 1918. The act does not command that a stepladder two or three feet in height shall be protected by a safety rail. It will be remembered that the height of the ladder is not stated in the complaint, therefore the averment of the answer in that regard is not in conflict therewith.

Turning now to the general clause of the Employers' Liability Act, it should be noticed that the facts set

forth in plaintiff's primary pleading do not show that the business in which defendant was engaged, namely, conducting a home for old men and women and orphan children, and in which plaintiff was employed at the time of the injury, involved a risk or danger inherent therein either to the plaintiff or the public. The first part of Section 1 of the law refers to persons engaged in the construction or repairing, etc., of any building or other structure, or the operation of machinery or the manufacture or transmission of electricity, or the use of any dangerous appliance or substance or machinery, and to shafts, wells, floor openings and similar places of danger and specifies definitely certain precautions to be taken for the safety of employees and the public. None of these things entered into the work in which plaintiff was employed. The general clause following requires that:

"All owners, contractors and other persons having charge of, or responsible for any work involving a risk or danger to the employees or public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb."

1, 2. It is manifest that this general clause, providing for care and precaution to be used in work involving a risk or danger, refers to employments additional to those mentioned in the first part of the section, which are similar in kind as to having danger inherent therein, or involved in the same, or combined inextricably, or nearly so, therewith. The act, as its title indicates, embraces within its scope what is usually termed dangerous or hazardous employment. It is a general rule of statutory construction that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest

extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned, unless the legislative intent clearly appears to the contrary: Black on Interpretation of Laws, p. 141; 2 Lewis' Sutherland Statutory Construction, § 360. In a certain sense, there is a risk or danger in a person going up or down an ordinary flight of stairs in a home, but this is not the kind of risk or danger embraced within the meaning of the statute. It would hardly be said that a person's work which required him to go up and down ordinary stairs, or hang clothing on a line using a common stepladder two or three feet in height not inherently defective, and with no particular danger involved therein, would be likely to harm or would be perilous, hazardous or unsafe. The whole language of the act denotes that the kind of employment thereby protected is that which is beset with danger, the hazardous, dangerous employments similar to those enumerated in the act, or which under the circumstances or manner in which it is being executed is rendered dangerous, within the meaning of the act: See *Olds* v. *Olds,* 88 Or. 209 (171 Pac. 1046, 1048). We therefore hold that the case, as delineated by the complaint and the admitted portions of the answer, does not come within the employers' liability law.

The next question involved is whether, under the admitted facts of the pleadings, the defendant is answerable for a common-law liability. The question involved was before this court in the case of *Hill* v. *Tualatin Academy,* 61 Or. 190 (121 Pac. 901), reference is hereby made for a full discussion of the subject to the opinion therein by Mr. Justice MOORE. It was said at page 198 of the opinion:

"In the case at bar it is evident upon principle and authority that, since the University holds all its prop-

erty in trust for charitable purposes, it is not liable for the alleged negligent acts of its officers or employees, under the circumstances detailed, and that in directing a verdict in its favor no error was committed."

3, 4. An action may be maintained against an officer of a charitable institution to recover damages for an injury caused by the negligence of such person, but the action must be against him in his individual and not in his corporate capacity so that if a recovery is awarded it will not be discharged from the trust funds: 11 C. J., p. 374. See, also, *Currier* v. *Trustees of Dartmouth College*, 117 Fed. 44, 54 C. C. A. 430; *Farrigan* v. *Pevear*, 193 Mass. 147 (78 N. E. 855, 118 Am. St. Rep. 484, 8 Ann. Cas. 1109, 7 L. R. A. (N. S.) 481); *Parks* v. *Northwestern University*, 218 Ill. 381 (75 N. E. 991, 4 Ann. Cas. 103, 2 L. R. A. (N. S.) 556); 15 Am. & Eng. Ency. Law (2 ed.), 762; 6 Cyc. 975. The "Tualatin Academy and Pacific University" was incorporated by a special act of the legislature in 1854. It is admitted in the instant case that the Odd Fellows Home of Oregon is conducted without profit of any kind and is maintained by assessment made upon the lodges and membership of the State of Oregon; that all the property of the institution is held by the Odd Fellows Home in trust and not otherwise, for the maintenance of the old men and women of the order, and the care and education of the orphan children of members of the order; that the defendant is a benevolent, eleemosynary corporation and is trustee only. It is organized under Chapter V, Title XLIV, L. O. L., for the organization of religious, charitable and educational corporations, Section 6796, which specifies the powers of such corporations, provides as follows:

"Upon the making and filing for record articles of incorporation as herein provided, the person or per-

sons subscribing the same, and his or their successor or successors in office, by the name or title specified in the articles, shall thereafter be deemed a body corporate, with continual perpetual succession, and shall have power to acquire and possess by donation, gift, or purchase, and to retain and enjoy, property, real, personal, and mixed, and the same to sell, grant, convey, or rent, or otherwise dispose of at pleasure; *provided, however, that no part of the resources of said corporation shall ever be used for any other than the object herein named.* * * "

The restriction as to the use of the resources in this section is to the same effect as the statute under which the Tualatin Academy, etc., was incorporated, which was considered in *Hill* v. *Tualatin Academy,* 61 Or. 190 (121 Pac. 901). It seems, the reason for the enactment of the proviso quoted is that the liability of charitable organizations for the torts of their agents has been the subject of much confusion and apparent conflict among the courts passing on the question of the liability of a charitable corporation for the negligence or other torts of its officers or servants. The reason most generally assigned for denying the liability of such organization for the negligence of its officers and servants, is that to permit the institution to be held liable for the neglect of its employees, would authorize the diversion of its funds intrusted to it from the purpose for which they were derived. There are two general classes of opinions where the liability is denied. First. Those cases in which the injury was received by a person who at the time was a recipient of the charity. Second. Those cases in which the injury was inflicted on a stranger. Many of the courts have declared generally that those administering a trust fund are not responsible for the torts of their agents because damages for such torts cannot be paid from the trust fund. However, liability is recog-

nized as to strangers and servants to be compensated from such trust funds. In one jurisdiction, it has been held that a charitable corporation is liable for the torts of its servants the same as any private individual or other corporation: See 5 R. C. L., p. 374, et seq., §§ 121–124.

Under these conditions of the decisions of the courts, the wisdom of the legislature is apparent in making the proviso that no part of the resources of such a corporation shall ever be used for any other than the object named in the statute. The meaning of this proviso is also made clear on account of the same circumstances. The restriction is sweeping without any exception whatever.

Laying aside the adjectives and conclusions, outside of the complaint as to the want of a safety rail and rubber nubs and other safety devices and precautions, which it is alleged could have been provided by defendant without interfering with the use of the ladder, and which plaintiff claims should have been furnished and taken in order to comply with the requirements of the employers' liability law, there is nothing left suggesting negligence. Only the pure accident of catching plaintiff's skirt on the stepladder is disclosed. The mere fact remains that plaintiff in the performance of her duties was required to use a small stepladder in hanging clothes on a line. It is not claimed, and we do not think that it could be claimed that this alone would constitute actionable negligence. According to the facts admitted in the pleadings in this case, defendant is not liable for damages.

The facts set forth in the complaint do not bring the cause within the provisions of the Employers' Liability Act, requiring the use of the devices mentioned and the strict care and precautions thereby enjoined.

There is no cause of action stated in the complaint. The trial court was right in granting a judgment in favor of defendant. The judgment is therefore affirmed. AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., MOORE and JOHNS, JJ., concur.

Argued at Pendleton May 8, reversed and suit dismissed July 9, rehearing denied September 10, 1918.

MARTIN v. GILLIAM COUNTY.

(173 Pac. 938.)

Statutes—Amendment—Setting Forth Act Amended—Budget Law.

1. Laws of 1915, page 297, merely declaring all districts, with certain exceptions, subject to Laws of 1913, page 458, the budget law provided for counties contravenes Article IV, Section 22, of the Constitution, inhibiting revising of amendment of an act by mere reference to its title, and requiring the act revised or section amended to be set forth in full.

From Gilliam: DAVID R. PARKER, Judge.

In Banc.

This is a suit to enjoin the collection of a ten-mill special road tax attempted to be levied by Road District No. 1 of Gilliam County on November 24, 1917. No attempt whatever was made by the Road District to comply with the so-called budget law. The question therefore squarely presented is as to the validity of a special road tax levied under the 1917 Highway Code without any budget.

Plaintiff brought this suit as an affected taxpayer. Defendants answered claiming the budget law did not apply to road districts acting under the 1917 statute. Plaintiff's demurrer to the answer was sustained and based upon a stipulation as to the facts the court ordered a decree for plaintiff holding the tax void.

The act requiring a budget in Oregon is Chap. 234, Laws 1913, p. 458. Section 1, among other things, provides:

"It shall be unlawful for any tax to be levied, proposed or adopted for any county unless an estimate shall have first been made of the amount of money proposed to be raised by taxation for the ensuing year and such estimate published and opportunity for a full and complete discussion thereof allowed in the manner hereinafter provided for. * * Estimates of the amounts to be raised by taxation shall be made a sufficient length of time in advance of all regular or special meetings at which by law levies are authorized to be made to permit publication as hereinafter provided."

Section 2 provides in part as follows:

"The estimates required together with a notice of the time and place at which such estimates may be discussed with the County Court shall be published at least twice prior to the time appointed for such proposed meeting in the official county newspaper provided that the first publication shall not be less than twenty days nor the second less than ten days prior to such meeting."

Section 6 of the act provides:

"It shall be the duty of the County Court or such person or persons under their authority as they shall designate to prepare the estimates in this act provided for and the cost of publishing the same shall be paid out of the funds of the county kept for purposes of advertising."

Chapter 222, Laws 1915, p. 297, reads as follows:

"An Act subjecting all tax levying districts, except cities having a population over 150,000, to the budget laws provided for counties.

"Be it enacted by the people of the State of Oregon:

"Section 1. All districts and corporate bodies or organizations having power to levy taxes except cities

having a population of over 150,000 inhabitants according to the last government census, are hereby made subject to the provisions of Chapter 234 of the General Laws of Oregon, 1913, and any other budget law that is now or may hereafter be in force applying to counties having a population of less than 150,000 inhabitants.

"Section 2. In complying with such law or laws the duties imposed on the county clerk or auditor shall be performed by the clerical officer or auditor of the tax-levying district and the duties imposed upon the County Court shall be performed by the tax levying board or body of the district, and the duties imposed upon any other officer of the county shall be performed by the corresponding officer of such district, if there be one, and if there be none, then by such officer as may be designated by the tax levying board or body of the district." REVERSED AND SUIT DISMISSED.

For appellants there was a brief over the names of *Mr. Jay Bowerman* and *Mr. T. A. Weinke*, District Attorney, with an oral argument by *Mr. Bowerman.*

For respondent there was a brief and an oral argument by *Mr. John B. Hosford.*

There was a brief submitted over the names of *Messrs. Carey & Kerr* and *Mr. Omar C. Spencer,* as *amici curiae.*

McBRIDE, C. J.—1. It is plausibly contended by appellant that the law of 1917 is practically complete in itself, and that under its provisions the so called budget law is inapplicable and unworkable. Waiving these considerations, however, we find an insuperable objection to the constitutionality of the act of 1915, *supra,* making the budget law applicable to "Districts, corporate bodies or organizations having power to levy

taxes." That objection is found in the flagrant disregard of Article IV, Section 22, of the Constitution, which reads as follows:

"No act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length."

That the act of 1915, *supra,* was intended to amend, and, if valid, would amend Section 1 of the Act of 1913, *supra,* by including other tax-levying corporations and organizations than counties, is plain. Had Section 22 of Article 4 been complied with, Section 1 of the Act of 1913 would have read, "It shall be unlawful for any tax to be levied, proposed or adopted for any county, (District or corporate body or organization having power to levy taxes)," etc. The radical nature of the change made by the attempted revision is apparent from the new matter bracketed in the above excerpt, and the entire disregard of the constitutional provision above quoted is conspicuous.

The act revised; the section amended is not set forth or published at full length or at all. This omission is within the mischief which Section 22, *supra,* was designed to prevent, as well as in direct contravention of its plain letter.

"The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effects, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws": Cooley, Const. Lim. (5 ed.), 182.

This act does not come within the spirit of the cases which very guardedly and reluctantly uphold repeals by implication. Here there is no attempt to enact a

new and independent statute upon the same subject as the act of 1913, *supra,* but an attempt to insert into it, and by reference to it, certain provisions enlarging its scope without setting forth the statute as it would appear after being so revised. If it can be done in this instance there is no limit to the extent to which statutes can be revised or amended without setting forth the amended statute at full length, and the constitutional provision above quoted would, therefore, be rendered nugatory. The act of 1915 is void. In the case of *Oregon-Wash. R. & N. Co.* v. *Johnson,* 87 Or. 240 (170 Pac. 290), we held the act of 1915, *supra,* applicable to road districts, the constitutionality of the law not being questioned by either party, but practically conceded. This is the first case in which the irregular manner in which it was enacted has been called to the attention of the court. While that case would probably have been reversed in any event on account of other irregularities in the proceedings, it is enough to say that had the constitutionality of the act of 1915 been questioned and the disregard of Section 22 of Article 4, *supra,* called to the attention of the court, our holding upon that question would have been in accord with the views enunciated in the present opinion.

It is conceded that the proceedings of the meeting are regular in all other respects. The decree of the Circuit Court is, therefore, reversed and the suit dismissed.

REVERSED AND DISMISSED. REHEARING DENIED.

Argued June 27, affirmed July 9, rehearing denied September 10, 1918.

ELWERT v. HANSEN.

(173 Pac. 939.)

Chattel Mortgages—Description—Sufficiency.

1. A chattel mortgage, describing the property as "forty head of milk cows, two horses and harness, and lease of fifty acres executed between parties named, now in the mortgagor's possession on the W. farm," is sufficient to enable third parties to identify the property by inquiry.

[As to the sufficiency of the description of property in chattel mortgage, see note in 14 Am. St. Rep. 239.]

Chattel Mortgages—Record—Constructive Notice.

2. The record of a chattel mortgage, which is sufficient to enable third parties to identify the property by inquiry, constitutes constructive notice to subsequent claimants.

From Washington: GEORGE R. BAGLEY, Judge.

Department 2.

Zwald Brothers, as partners, conducted a dairy on the Westhoff farm in Washington County. On November 12, 1912, they purchased forty milk cows from Henry Anderegg and Henry Naegeli, for which they executed their joint promissory note for $4,000, secured by a chattel mortgage upon the cows, two horses and harness, and the lease of the land used by them in their business. This chattel mortgage was recorded on May 8, 1914, and on March 2, 1914, it was, for a valuable consideration, assigned to plaintiff, and assignment being recorded on May 20, 1914. Thereafter, on March 8, 1915, the cows were examined by the state veterinarian, and tested for tuberculosis and eleven of the animals referred to in the mortgage were condemned to slaughter. Under the provisions of Chapter 14, General Laws of Oregon, 1913, the owners then became entitled to indemnity for their loss

in the sum of $275, one half to be paid by the county, and the other half by the state. Such claim for indemnity was subsequently allowed and the necessary warrants drawn therefrom. In the meanwhile, the defendant Hansen had sold some cattle to Zwald Brothers on March 12, 1915, taking therefor their note in the sum of $130, and on October 19, 1915, sold them some more cattle, taking their note for $185, and at the same time had an agreement with them, to the effect that when the indemnity warrants should be issued they should be assigned to him to apply in payment of the notes held by him, and on March 10, 1916, John Zwald undertook to assign his interest in the indemnity money to Hansen. Plaintiff brings this suit seeking a decree establishing his claim, by virtue of his chattel mortgage, to the indemnity money, and for a decree that it be paid to him to be applied upon his debt.

The defendant Hansen by his answer sets up the facts upon which he claims a prior right to the money. A trial being had, there was a decree in favor of plaintiff, from which the defendant Hansen appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. A. S. Dresser.*

For respondent there was a brief over the names of *Mr. Charles T. Haas* and *Mr. Joseph Woerndle,* with an oral argument by *Mr. Haas.*

BENSON, J.—1, 2. The only question presented for our consideration is, whether Elwert or Hansen has the prior right to the money due from the state and from Washington County, as indemnity for the loss of the tubercular cows. Defendant's counsel insists that the

chattel mortgage is valueless as against his claim by reason of its inadequate description of the mortgaged property. The description of the property as set out in the instrument is as follows:

"Forty (40) head of milk cows; 2 horses and harness for same; and the Lease of 50 acres of farm land made and executed by and between Zwald Brothers and Mrs. B. Westhoff, now being in our possession on the Westhoff farm, County of Washington, State of Oregon."

This description, while it does not describe in detail the animals which are the subject of the lien, does tell what kind of animals they are, and where they are located, and tells third parties enough to enable them to go to that neighborhood and by inquiry identify the property. This, by the weight of authority, is all that is required: *Sommer* v. *Island City Mercantile etc. Co.*, 24 Or. 214 (33 Pac. 559); Jones on Chattel Mortgages (4 ed.), § 54. The record of the mortgage was constructive notice to Hansen, charging him with the information which he might have acquired, and the decree of the trial court is therefore affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., BEAN and JOHNS, JJ., concur.

Argued July 10, affirmed July 30, rehearing denied September 10, 1918.

CATHCART *v.* MARSHFIELD.

(174 Pac. 138.)

Appeal and Error—Record—Matters Reviewable—Evidence.

1. Portions of testimony taken at jury trial, not made a part of the bill of exceptions, and no application having been made to incorporate them, cannot be considered on appeal.

Appeal and Error—Record—Matters Reviewable—Instructions.

2. Instructions not made part of bill of exceptions, and not incorporated in record by motion, cannot be considered on appeal.

New Trial—Grounds for.

3. Since the trial court can grant a new trial on its own motion, it may set aside a verdict and grant a new trial on grounds other than those stated in a motion.

[As to power of trial court to grant a new trial of its own motion, see note in Ann. Cas. 1914A, 412.]

Appeal and Error—Setting Aside Verdict—Review.

4. Where court granted a motion for new trial without stating reason therefor, error will not be presumed, although specific grounds stated in motion were not good.

From Coos: JOHN S. COKE, Judge.

Department 2.

This is an action to recover damages for the appropriation of certain lots in the City of Marshfield and the destruction of the trees and shrubbery thereon. The real question at the trial was as to the amount of damages which plaintiff sustained. The jury returned a verdict for $570, for which, with costs, judgment was entered against the defendants. Based upon a supporting affidavit, defendants filed a motion to set aside the verdict and for a new trial, for the reasons that the jury had disregarded the instructions of the court; that the court had refused to give certain instructions requested by the defendants and on account of the misconduct of the jury. The court sustained the motion and set aside the verdict, from which ruling the plaintiff appeals. The only question presented is whether or not error was committed in setting aside the verdict and granting a new trial. AFFIRMED.

For appellant there was a brief over the names of *Mr. John F. Hall* and *Mr. Ben S. Fisher,* with an oral argument by *Mr. Hall.*

For respondent there was a brief over the names of *Mr. Arthur K. Peck, Mr. Cassius R. Peck* and *Mr. J. T. Brand,* with an oral argument by *Mr. Arthur K. Peck.*

JOHNS, J.—1, 2. On April 9, 1917, the transcript on appeal was filed in this court, which consisted only of the complaint, answer, the statement of the fact that the case was tried by a jury which returned the verdict, the entry of the judgment upon the verdict, the motion for a new trial, the supporting affidavit, the ruling of the court sustaining the motion, notice of, and undertaking on, appeal, with the certificate of the county clerk. On August 13, 1917, appellant presented a motion for permission to file as an exhibit in this court the testimony of certain witnesses of the plaintiff and a certified copy of the instructions which were given by the trial court. Concurrent therewith opposing counsel filed objections to the making of such an order. On October 9, 1917, this court made an order allowing the filing of such motion subject to such objections, to be heard at the argument. We do not know how or upon what theory portions of the testimony taken at a jury trial, and the instructions of the lower court, can be filed as exhibits in this court. Neither do we know why, in that form, such testimony or instructions could be considered by this court for any purpose whatever. They are no part of the bill of exceptions and no application was ever made to incorporate them in, or make them a part of, the bill of exceptions. For such reasons they cannot be considered on this appeal.

3, 4. The defendants' motion for a new trial was based:

"Upon the grounds that the jury had disregarded the instructions of the court and based upon a refusal to give certain instructions asked by the defendants, and upon the finding of a scrap of paper in the jury-room by one of the defendants' attorneys, the scrap of paper not being signed by any person whomsoever."

In the case of *De Vall* v. *De Vall,* 60 Or. 493 (118 Pac. 843, 120 Pac. 13, Ann. Cas. 1914A, 409, 40 L. R. A. (N. S.) 291), this court, in a well-considered opinion, held that:

"Where, on an appeal taken from an order setting aside a judgment and granting a new trial on the ground of the giving of an erroneous instruction, there is no bill of exceptions or contention that the instruction was not improper, its propriety cannot be reviewed.

"By Section 174, L. O. L., providing that former judgments may be set aside and new trials granted 'on the motion of the party aggrieved,' a trial court is not precluded from exercising its inherent power to set aside a verdict of its own motion; and the setting aside of a judgment for a reason not set forth in a motion to set aside is therefore proper.

"Courts of general common-law jurisdiction have inherent power to grant new trials; and the power will not be deemed to have been taken away by statute, unless intent to do so is clear.

"Sections 173–178, L. O. L., authorizing motions for new trial, have reference solely to motions for new trial, and do not restrict the common-law power of courts to correct their own mistakes."

In the case of *Archambeau* v. *Edmunson,* 87 Or. 476 (171 Pac. 186), this court further held that:

"Under Article VII, Section 3, of the Constitution, as amended, declaring that in actions at law where the value in controversy shall exceed $20 the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court unless the court can affirmatively say there is no evidence to support the verdict, the trial court has authority on its own motion to grant a new trial on account of errors in instructions submitting the cause to the jury, even though no exception was taken."

It appears from the journal entry setting aside the verdict by the lower court that:

"It is ordered that the judgment heretofore entered herein on the ninth day of January, 1917, be and the same is hereby set aside and held for naught and a new trial is granted herein."

After the motion with the supporting affidavit was filed the court had authority to set aside the verdict both as a statutory and an inherent common-law right.

No specific reason is assigned and we are not advised as to why the verdict was set aside. Error will not be presumed and it does not affirmatively appear that there was any error in such ruling by the trial court. The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BEAN and HARRIS, JJ., concur.

Argued June 27, reversed and remanded July 30, rehearing denied September 10, 1918.

DAVIDSON v. SECURITY LIFE INSURANCE COMPANY.

(174 Pac. 154.)

Insurance—Life Policy—Reinstatement—Application—Warranties.

1. Application for reinstatement of lapsed life policy, whereby insured warrants certain things, enters into and modifies the reinstated policy, though the application for insurance and original policy declared his statements representations and not warranties, in the absence of fraud.

[As to warranties and representations in insurance and their effect, see notes in 16 **Am. Dec.** 462; 59 **Am. Rep.** 816.]

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 2.

This is an action to recover upon a policy of insurance upon the life of William H. Davidson. It is alleged in the complaint that the contract of insurance was executed on March 15, 1913, in which plaintiff was

named as the beneficiary; that the insured died on November 17, 1915, having paid all premiums according to the terms and conditions of the policy, and having complied with all of the terms and conditions thereof; that thereafter plaintiff duly notified defendant of the death, furnished the required proofs thereof, and duly performed all the duties and kept all the conditions upon her part, and that defendant has refused to pay the sum of $1,000, as agreed, or any part thereof.

The answer, after some denials and admissions, pleads affirmatively that under and pursuant to terms of the policy, William H. Davidson paid the premiums as specified in the contract, up to the fifteenth day of September, 1914, and thereafter allowed the policy to lapse; that on the tenth day of March, 1915, he presented himself to the medical examiner of defendant for examination upon his application for reinstatement of the policy, and was subjected to certain questions as to his then physical condition and health; that at that time he practiced fraud upon the defendant and the medical examiner in that he falsely stated that since the date of his original examination for such policy, he had had no sickness, ailment or injury except a severe cold in August, 1914, of four days' duration, and that he had not been attended nor prescribed for by any physician since for said policy, except by Dr. Garnjobst (the medical examiner), for the severe cold already mentioned, and that the insured warranted the truth of said statements, and further warranted that he was then of sound constitution and in good health, and ratified and confirmed the statements made in his original application for said policy, and agreed that if any of the statements or representations contained in said application for reinstatement should

prove to be incomplete or untrue then said reinstatement should be *ipso facto* null and void; that said Davidson practiced fraud upon the medical examiner by substituting for examination urine other than his own. It is then averred that the statements of the applicant were false and untrue, and known by him to be so, in that, the applicant was then afflicted with a serious malady known as diabetes mellitus, and that theretofore, and during the time that the premiums were in default, he had consulted physicians who had advised him that he was so afflicted and had treated him therefor; that he knew that his said statements were false, and made them, and concealed his true condition for the purpose of deceiving the defendant and securing the reinstatement of the policy. Defendant then pleads its reliance upon Davidson's false statements, and alleges that if it had known the truth it would not have reinstated the policy; that thereafter the applicant's physical condition grew worse, and on November 17, 1915, he died of diabetes mellitus. Defendant then makes a tender of the premiums paid upon the attempted reinstatement and asks for judgment.

The reply admits the lapse of the policy and the reinstatement thereof, and otherwise consists of denials. A trial was had to a jury, resulting in a verdict and judgment for plaintiff and defendant appeals.

REVERSED AND REMANDED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Chester G. Murphy* and *Messrs. Smith & Bryson*, with an oral argument by *Mr. Murphy*.

For respondent there was a brief over the names of *Mr. J. S. Medley* and *Mr. J. N. Devers*, with an oral argument by *Mr. Medley*.

BENSON, J.—1. The assignments of error challenge the action of the trial court in the giving of certain instructions to the jury and in its refusal to give certain requested instructions. The court charged the jury upon the theory that the statements made by the insured at the time of the reinstatement of his policy were representations and not warranties, while the instructions requested by the defendant and refused by the court were framed upon the hypothesis that the statements of the decedent in his application for reinstatement, regarding his physical condition and health were warranties, which, if not strictly true, would render the policy void. The following excerpts from the charge as given to the jury illustrates the view of the trial court as to the law:

"These alleged facts are denied by the plaintiff and there are therefore questions of fact for you to decide. First, as to whether at the time of making application for reinstatement the insured William H. Davidson was afflicted with diabetes, and second, whether the insured knew at said time he was afflicted with diabetes, and third, if he was afflicted with diabetes, did he fail to disclose this fact, if it was a fact, to the examining physician, Dr. Garnjobst? I instruct you, gentlemen of the jury, if you find by a preponderance of the evidence, that at the time William H. Davidson made application for reinstatement in the defendant company, he was afflicted with diabetes mellitus, and if you find that he knew he was so afflicted, or had reason to believe that he was afflicted with said disease, and if you find that he did not disclose this fact, if it was a fact, to the examining physician, then plaintiff cannot recover, and it would be your duty to return into court a verdict for the defendant.

"If, however, you find from the evidence, that at the time William H. Davidson made application for reinstatement in the defendant company, he was in fact afflicted with diabetes mellitus, and if you further

find that at said time said insured did not know or have reason to believe that he was afflicted with said disease, if he was so afflicted, then the plaintiff would be entitled to recover a verdict at your hands.

"If the insured did not in fact, at the time of making said application, have diabetes, then plaintiff would be entitled to recover."

Defendant's contention is well illustrated in the following requested instructions which were refused:

"The court instructs the jury that if the insured, William H. Davidson, was not in sound health on the tenth day of March, 1915, when he applied and was examined for reinstatement on his policy of insurance, the defendant is entitled to a verdict at your hands.

"The court instructs the jury that 'sound health,' as used with reference to life insurance, means that state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously.

"The court further instructs the jury that if you find from the evidence that the said William H. Davidson, on the date of his application and examination for reinstatement on his policy, was not in sound health, but did not know it, you must, nevertheless, find for the defendant."

The policy itself contains this sentence:

"All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall void this policy unless it is contained in the application therefor."

And the application itself contains the following clause:

"It is hereby agreed that all the statements made herein (part one), and in any amendments or supplements hereto, and also those I make to the Company's Medical Examiner (part two), which are hereby made a part of this application, are full, complete and true, and shall, in the absence of fraud, be deemed repre-

sentations, and not warranties, and are offered to this company as a consideration for the policy applied for, etc."

Again, at the close of "part two" of the same application is found the following:

"It is hereby agreed that the foregoing statements and answers, made to the Company's Medical Examiner, are full, complete and true, and shall, in the absence of fraud, be deemed representations and not warranties, and are offered to the Company as a consideration for the contract, and to complete the application for insurance heretofore made."

Keeping these provisions of the original contract in mind, and that from the fifteenth day of September, 1914, to March 10, 1915, there was a default in the payment of premiums, and that by its terms the policy had lapsed, we find the insured applying for a reinstatement of the policy. The first sentence of the application therefore reads thus:

"Whereas, Policy No. 27137, issued on my life by the Security Life Insurance Company of America (Inc.), lapsed by reason of the nonpayment of a premium due on the 15th day of September, 1914, I hereby make application for the reinstatement of said policy and warrant as follows: That, since the day of my examination for the above numbered policy I have had no sickness, ailment or injury whatever, except"; complaint, "severe cold," date, "August, 1914," duration, "4 days."

Then after some further statements, there occurs this statement:

"I further warrant and declare that I am of sound constitution, temperate habits, and am in good health, and that my occupation is farming and dairying."

The concluding paragraph contains this clause:

"I further agree that said policy shall not be revived until this application shall be approved in writing by the President, Secretary or Medical Director of the company, * * and that if any of the statements or representations contained herein shall prove to be incomplete or untrue then this reinstatement shall be *ipso facto* null and void."

It will be observed that in the execution of the original contract the parties thereto expressly agree that, in the absence of fraud, the statements of the applicant shall be deemed representations and not warranties, but that when they come to the making of an agreement for the revival of that contract, after its death had been accomplished by the default of the insured, it is expressly agreed that the applicant's statements as to the present condition of his health shall be warranties, and when they stipulate that this later agreement shall become a part of the policy as revived, they carry into that resurged instrument a covenant to the effect that the applicant's statements are warranted to be correct. A warranty in insurance enters into and forms a part of the contract itself. An eminent authority expresses it in these words:

"By an express warranty the insured stipulates for the absolute truth of his statements. Good faith and honest purpose will not excuse error. The statements must be entirely true, or the warranty is not fulfilled. * * Where an insured makes the truth of the statements contained in his application the basis of his contract of insurance, the question whether or not a false statement is actually material to the risk is unimportant, as is also the question whether or not the falsehood was intentional. To avoid liability it is sufficient for the insurer to show that the statement was actually untrue": Kern on Insurance, 321.

This doctrine is approved in *Buford* v. *N. Y. Life Ins. Co.*, 5 Or. 334.

If the charge of misrepresentation had been based upon the original application, a different conclusion might have been reached, but the agreement for revival of the policy is a later agreement, modifying to that extent the terms of the original. We conclude that the trial court erred in giving the instructions of which complaint is made, and the judgment is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED. REHEARING DENIED.

McBRIDE, C. J., BEAN and JOHNS, JJ., concur.

Argued June 20, reversed and remanded July 30, rehearing denied September 10, 1918.

GASTON, TOWN OF, *v.* THOMPSON.

(174 Pac. 717.)

Statutes, Subjects and Titles.

1. Section 5126, L. O. L., as to persons having the right to water privilege not being required to construct or keep in repair any bridge across any mill-race, etc., being a part of an act of territorial legislature entitled "An act fixing the rate of toll for grinding," is of no force, in view of Enabling Act, Section 6, as to every law embracing but one subject, expressed in its title.

[As to when the title of a statute embraces but one subject and what may be included thereunder, see note in 79 **Am. St. Rep.** 456.]

Constitutional Law—Police Power of State.

2. The use of all property is subject to the general police power of the state, to be exercised either directly or through subordinate agencies to whom the state may intrust the exercise of that prerogative.

Municipal Corporations—Police Power—Control of Property.

3. Act of 1893 (Section 3229, L. O. L.), conferred upon cities and towns incorporated under it general police power to regulate the use of private property, and a mill constructed without license before incorporation of town, in what was then a county road, and which is now maintained along and across a street, is no exception.

Highways—Encroachment—Mill-race.

4. From statutes requiring the owner to bridge mill-races where they cross a county road there may be inferred authority for passing laterally over such roads, but not for going along them longitudinally.

Highways—"Nuisance Per Se"—Mill-race.

5. The admitted fact that a mill-race occupies a portion of a highway longitudinally makes it a nuisance *per se*, at common law, in the absence of any authority for its being there.

Statutes—Amendment by Reference to Title Only.

6. Statute of February 21, 1913 (Laws 1913, p. 136), granting to the town of Gaston exclusive control over county roads within its corporate limits, cannot, in so far as it attempts to amend the general law, be considered, since it does not set out the part of the statute as amended, as required by Article IV, Section 22, of the Constitution.

Municipal Corporations—Control of Streets—County Roads.

7. Statute of February 21, 1913 (Laws 1913, p. 136), amounted to an offer on the part of the state to surrender to the town of Gaston the control over county roads within its corporate limits and initiative charter (April 14, 1914), by which the town assumed control over all public parks, etc., reasonably included what was formerly the county road in question, and operated as an acceptance of the offer.

Municipal Corporations—Control of Streets—County Roads.

8. A mill-race constructed without license and before incorporation of the town of Gaston in what was then a county road, whether a nuisance or not, is subject to reasonable police regulation, after inclusion within corporate limits of said town.

Injunction—Violation of Ordinance—Remedy at Law.

9. Defendant, maintaining a mill-race within corporate limits of town of Gaston, contrary to its police regulations, being a nonresident, so that the legal remedy provided by ordinances is insufficient to work out obedience, relief will be granted in equity.

Municipal Corporations—Control of Streets.

10. Requiring defendant to keep mill-race maintained along a street of plaintiff, to be covered with planks sufficient for ordinary travel, is a reasonable exercise of the police power committed to plaintiff by statute of 1893 (Laws 1893, p. 119), and reasserted in initiative charter (April 14, 1914), and is properly classified as local, special and municipal legislation, under Article IV, Section 1a, of the Constitution, reserving initiative power to voters.

Municipal Corporations—Control of Streets—Scope and Authority.

11. The existence of an open mill-race in the principal thoroughfare of a town primarily affects the local situation, and is within scope of authority of cities and towns, under Article XI, Section 2, of the Constitution, empowering the legal voters to enact and amend their charters.

From Multnomah: EDWIN V. LITTLEFIELD, Judge.

Department 1.

The town of Gaston, a municipal corporation in Washington County, brings this suit against the defendant as the owner of a mill-race, to enjoin him from operating the same within the town limits without maintaining upon it a substantial covering. It alleges its first incorporation in December, 1911, under the general law of the state on that subject, and that by the initiative a new charter was enacted on April 14, 1914. The complaint informs us that prior to its first incorporation the County Court of Washington County regularly established County Road number A–185; that it is within the confines of the town and "a portion thereof runs east and west and the remainder north and south, within the boundaries of said town." It further appears that the legislative assembly of the state, by the act of February 21, 1913, granted to Gaston "exclusive control and jurisdiction over all county roads within its respective corporate limits" and declared the same to be streets.

It is said that the portion of the road running east and west is known as Mill Street, and the part running north and south is called Front Street. The pleading discloses that prior to the first incorporation of the town a milling corporation, after securing rights of way over certain private property, constructed a mill-race which, so far as this case is concerned, runs along Mill Street easterly to the point where it turns into Front Street, and thence diagonally across the latter thoroughfare; and that so far as it is within the former county road, now constituting the two streets, the same was constructed without license or authority. The ditch is located about five feet south of the center line of Mill Street and crosses Front Street at an angle of about forty-five degrees. According to the complaint,

it is about ten feet wide and eight feet deep, having a continuous flow of water therein, varying from four to six feet in depth, and has been maintained and operated by the defendant since prior to the first incorporation of the town.

The amended charter, among other things, gave the council power

"to punish interference with water ditches and pipes and the water therein, mill-races, drains and sewers and appurtenances thereof, and regulate and require the same to be kept in repair, bridged and in condition for travel thereover at the expense of the owner, whether the same be owned by the town, private individuals or corporations, and to revoke any license or franchise held by any private individual or corporation for failure so to do, and to punish such failure by fine and imprisonment."

The plaintiff says in effect that on July 5, 1916, in pursuance of the charter provision just quoted, the council enacted and the mayor approved

"An ordinance making it unlawful to maintain a mill-race or water ditch without bridging and covering the same in the manner provided herein and providing a penalty for violations of the provisions hereof."

It required every person, firm or corporation maintaining such a ditch or mill-race in a street in the town to provide the same with a suitable and substantial covering of planks, spikes and stringers, under the supervision and subject to the approval of the council. It declared that after August 10, 1916, any person violating the ordinance should be subject to a fine; that every day of continuance should be deemed a separate offense, etc. It is stated substantially that immediately after approval of the ordinance a copy was delivered to the defendant and that he has actual knowledge of the terms and requirements thereof, notwith-

standing which he continues to maintain and operate the race, the entire length thereof, without any cover on the same, all in disregard and violation of the ordinance mentioned. Further, it is averred that on April 25, 1917, the council adopted a resolution the essence of which is:

"That the existence of the race without a covering constitutes, and the same is hereby declared a nuisance."

The complaint says:

"That the defendant is a nonresident of the town of Gaston, Oregon, and is not within the jurisdiction of said town or the officers thereof and does not go within the said town, and the officers of said town are without power to enforce said ordinance by criminal prosecution for violation thereof."

It is charged also that the open race obstructs travel over that part of the streets occupied by it and is a dangerous menace to the safety of the public which has occasion to use the streets, and that by reason of the defendant's refusal to cover the same as required by the ordinance, the streets are obstructed and the plaintiff may, by reason of accident and injury resulting therefrom, be required to respond in damages. The prayer is for a decree enjoining the defendant from operating the race without a cover thereon.

That the road was laid out and established legally and that the mill-race in question was constructed in the road are both admitted by the answer, but it is denied that the race was dug in the road without license or authority. The ownership of the race is admitted, but the defendant claims to have leased the same to a tenant who operated it subsequent to August 8, 1916. He also admits the reception of a copy of the ordinance. He admits living in Portland. Other-

wise the complaint is denied. The defendant avers that prior to December 6, 1911, the date of the first incorporation of the town under the general law, his predecessors in title operated a flouring-mill and the mill-race and kept the same in good repair for the accommodation and use of the public and that on January 1, 1900, he purchased the same and operated it until August 8, 1916, when he leased it to a tenant to be carried on according to the laws of Oregon relating to the operation and building of flouring-mills, and that the tenants covenanted with him to keep the property, including the race, in good repair. He also says that as a compromise of the dispute between himself and the town it was agreed that he should construct a bridge over the ditch where it crosses County Road A–185 in Washington County and should build a three-board fence along the race where it runs along the road, all of which he carried out at an expense of $125. Finally it is alleged that upon August 8, 1916, he leased the property to some tenants who operate the mill and race and are keeping them in good repair.

The reply traverses the answer in material particulars, especially as to the alleged compromise. A supplemental answer was interposed, setting up a lease to another tenant, in substantially the same terms as the first, and that was denied by the supplemental reply. The Circuit Court dismissed the suit after a hearing and the town appeals. REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Henry T. Bagley* and *Mr. Lotus L. Langley,* with an oral argument by *Mr. Bagley.*

For respondent there was a brief over the names of *Mr. Plowden Stott* and *Mr. John T. McKee,* with an oral argument by *Mr. Stott.*

BURNETT, J.—The chronology of events involved in this litigation may be thus set down: first, the admitted regular establishment of the county road; next, the digging of the mill-race; then the incorporation of the town under the general law of 1893; and, finally, the enactment of a new charter by the initiative process, containing the excerpt already quoted. Under the general law by virtue of which the plaintiff was first incorporated it had a right

"to exercise any and all police regulations concerning the public morals, public safety, public health and public convenience of the inhabitants of any such city or town": L. O. L., § 3229.

In addition to the power assumed by the initiative charter as stated, that instrument gave the council power "to prevent and remove nuisances and to declare what shall constitute the same." (Section 15.) By Section 1 the town was awarded the power

"to sue and be sued, defend and be defended, and plead and be impleaded in all courts of justice of the State of Oregon and of the United States in all actions, suits and proceedings whatever; to purchase, hold, own, lease and acquire and possess by purchase, gift or otherwise, both real and personal property within said town for public buildings, public works and improvements and may and shall have the right of possession and control of all public parks and all tracts of land within the limits hereinafter described, which have heretofore and may be hereafter dedicated, or in whatsoever manner obtained, for public purposes."

1, 2. The defendant urges as a defense the statute codified in Section 5126, L. O. L., reading thus:

"Any person or persons having the right to a water privilege shall not be required to construct or keep in repair a bridge or bridges across any race convey-

ing water to or from his or their mill on any road or roads."

This contention is without foundation for the following reason: The section was part of an act of the territorial legislature entitled "An act fixing the rate of toll for grinding." This legislation was had under the authority of the congressional act of August 14, 1848, entitled, "An act to establish the territorial government of Oregon." The last sentence of Section 6 of the enabling act reads thus:

"To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

No proper reasoning can include in a title "fixing the rate of toll for grinding" an exemption from bridging a mill-race. So far as the latter provision is concerned it is of no force or effect and nothing can be claimed by the defendant under its provisions. Moreover, the use of all property whatever is subject to the general police power of the State, to be exercised either directly or through subordinate agencies of the government to whom the state may intrust the exercise of that prerogative.

3–5. The act of 1893 conferred this authority upon cities and towns incorporated under it and the mill-race in question is not exempt from this delegated power. Although the defendant denies that the race was constructed without authority of the County or Circuit Court of Washington County, yet no license from either of those tribunals appears in the evidence. Indeed, no statutory sanction can be found vesting in any court the prerogative of allowing a private concern to construct a mill-race in a county road. From statutes

requiring the owner to bridge such water-ways where they cross a county road we may infer the authority for thus passing laterally over them, but not for going along them longitudinally. The result is that the ditch in question is in the county road solely by sufferance and is all the more subject to reasonable police regulation. The admitted fact that it occupies a portion of the highway longitudinally makes it a nuisance *per se* at common law in the absence of any authority for its being there: Joyce on Nuisances, § 214; 13 R. C. L. 186; *Milarkey* v. *Foster,* 6 Or. 378 (25 Am. Rep. 531); *Roseburg* v. *Abraham,* 8 Or. 509; *Van Buskirk* v. *Bond,* 52 Or. 234 (96 Pac. 1103).

6, 7. The statute of February 21, 1913, granting to the town the exclusive control over county roads and declaring the same to be streets is in effect an attempt to amend the general law providing for the incorporation of cities and towns so as to affect only the town of Gaston. In that aspect it cannot be considered because, for instance, it does not set out the part of the statute as amended: Constitution, Art. IV, § 22. The most that can be said of this legislation is that it amounted to an offer on the part of the State to surrender to the municipality in question the control over the county road, but the town was not bound to accept the same. In the initiative charter, however, we find that the town assumed "control over all public parks and tracts of land within the limits hereinafter described, which have been heretofore or may be hereafter dedicated, or in whatsoever manner obtained, for public purposes." This language reasonably includes what was hitherto the county road and operated as an acceptance of the offer of the State in the act of February 21, 1913.

8. Whatever may be said, here is an open water-way within the limits of the town, more or less affecting

the inhabitants thereof. It obstructs travel along a public highway over which the city rightfully assumed jurisdiction. Independent of whether the race is a nuisance or not, it is subject to reasonable police regulation. A planing-machine is not a nuisance, yet we find it required that its knives shall be protected by guards, to prevent injury to the attendant workmen. An automobile is not a nuisance, but the statute demands that it carry lights at night. Many other instances might be pointed out as illustrative of the exercise of the police power for the safety and convenience of the public, all at the expense of the private owner. He takes and uses his property subject to the right of the State or its duly constituted agencies to regulate and control his use of it, in compliance with reasonable rules designed for the safety and convenience of the public. The cases cited by the defendant to excuse him from the expense of covering the ditch are instances in which the rights sought to be regulated were acquired before the establishment of the passageway. This distinction is pointed out by Mr. Justice MOORE in *Mutual Irr. Co.* v. *Baker City,* cited below. Besides obstructing the travel along the county road in question, now a street, a race of the kind, without a covering, is more or less a menace to the safety of children, who are liable to fall into the same and be drowned.

9. It is admitted that the defendant is not within the city limits and that he resides in the City of Portland. In his absence from the town of Gaston he is not subject to arrest under the city ordinances and the authority of the town over his property cannot be thus enforced. In other words, its legal remedy provided by its ordinances on the subject is not enforceable and is insufficient to work out obedience to its police regula-

tions. The town has not a plain, speedy or adequate remedy at law. Acting under the initiative charter, it has proclaimed by resolution that the race in question is such an annoyance to the public as brings it within the definition of the term "nuisance." This would not, however, exonerate it from proof thereof unless the pleadings had admitted, as they do, enough facts on which the court can draw the legal conclusion that it constitutes a common-law nuisance.

In *Mugler* v. *Kansas,* 123 U. S. 623, 678 (31 L. Ed. 205, 8 Sup. Ct. Rep. 273), the court had under consideration the thirteenth section of an act of the State of Kansas declaring, among other things, that all places where intoxicating liquors were manufactured, sold, bartered or given away in violation of the act should be common nuisances. It was contended that equity had no jurisdiction to enforce that provision without a previous judgment at law. After quoting from 2 Story's Eq., Sections 921, 922, Mr. Justice HARLAN used this language:

"The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy, than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury: *District Attorney* v. *Lynn & Boston R. R. Co.,* 16 Gray (82 Mass.), 242, 245; *Attorney General* v. *New Jersey R. R.,* 3 N. J. Eq.

136, 139; *Attorney General* v. *Tudor Ice Co.*, 104 Mass. 239, 244 (6 Am. Rep. 227); *State* v. *Mayor etc.*, 5 Port. (Ala.) 279, 294 (30 Am. Dec. 564); *Hoole* v. *Attorney General*, 22 Ala. 190, 194; *Attorney General* v. *Hunter*, 16 N. C. (1 Dev. Eq.) 12; Eden on Injunctions, 259; Kerr on Injunctions (2 ed.), 168.

"As to the objection that the statute makes no provision for a jury trial in cases like this one, it is sufficient to say that such a mode of trial is not required in suits of equity brought to abate a public nuisance."

The opinion goes on further to hold in substance that while proof of the hurtful character of the thing in question must be afforded notwithstanding the legislative direction that such a thing shall be construed a nuisance, yet the equity tribunal is as competent to determine that matter as a court of law.

It would be intolerable to hold that the owner of property could defy the proper authority of a city or town by remaining outside its territorial jurisdiction while the use of his property in the manner forbidden by the police regulations would continue indefinitely. Nor does it avail the defendant to say that he has leased the property to another, for that is merely contracting with that other to manage the defendant's mill-race in a way forbidden by the police regulations.

10, 11. The city had a right under the circumstances to resort to the equity side of the State courts for relief. It does not attempt the extreme measure of utterly destroying the ditch; it merely required that his mill-race for a distance, according to the pleadings, of about three hundred feet, shall be kept covered with planking sufficient for ordinary travel. In our judgment, this is a reasonable exercise of the police power committed to the town by the general statute of 1893, and reasserted in the initiative charter. The existence of the open water-way in the principal thorough-

fare of the town primarily affects the local situation and it is legitimately within the scope of the authority of cities and towns under Article XI, Section 2, of the Constitution, empowering the legal voters thereof to enact and amend their municipal charters subject to the Constitution and criminal laws of the State of Oregon. It is also properly classified as local, special and municipal legislation, the initiative power over which is reserved to the legal voters of the municipality under Article IV, Section 1a, of the Constitution. That a city may resort to the courts in such an instance is further illustrated by the following precedents: *Bernard* v. *Willamette Box & Lumber Co.*, 64 Or. 223 (129 Pac. 1039); *San Francisco* v. *Buckman*, 111 Cal. 25 (143 Pac. 396); *Fresno* v. *Fresno Canal & Irr. Co.*, 98 Cal. 179 (32 Pac. 943); *Llano* v. *Llano County*, 5 Tex. Civ. App. 132 (23 S. W. 1008); *Village of Pine City* v. *Munch*, 42 Minn. 342 (44 N. W. 197, 6 L. R. A. 763); *Coast Co.* v. *Borough of Spring Lake*, 58 N. J. Eq. 586 (47 Atl. 1131, 51 L. R. A. 657); *City of Red Wing* v. *Guptil*, 72 Minn. 259 (75 N. W. 234, 71 Am. St. Rep. 485, 41 L. R. A. 321); *Inhabitants of Houlton* v. *Titcomb*, 102 Me. 272 (66 Atl. 733, 120 Am. St. Rep. 492, 10 L. R. A. (N. S.) 580). For instruction on many features of the instant case one may read with profit the opinion of Mr. Justice MOORE in *Mutual Irr. Co.* v. *Baker City*, 58 Or. 306 (110 Pac. 392, 113 Pac. 9).

The decree of the Circuit Court is therefore reversed and the cause remanded to that court with directions to enter a decree according to the prayer of the complaint, with a proviso that the defendant be allowed a reasonable time, there to be fixed, within which to comply with the demand of the plaintiff that the race be covered with substantial planking in a manner rea-

sonably safe to sustain ordinary travel over the highway in question.

Reversed and Remanded. Rehearing Denied.

McBride, C. J., and Harris and Bean, JJ., concur.

Argued July 12, modified July 30, rehearing denied September 10, 1918.

McLENNAN *v.* McLENNAN.

(174 Pac. 161.)

Divorce—Custody and Maintenance—Modification of Decree.

1. The Supreme Court has jurisdiction, on appeal from denial of a motion to modify the decree as to custody and maintenance of children, to modify the decree.

From Multnomah: George N. Davis, Judge.

Department 2.

On February 9, 1914, plaintiff obtained a decree of divorce from the defendant, wherein she was awarded the custody of two infant sons, and certain money and property as alimony, but the decree is silent as to any award for the nurture and education of the children. The custody of the third child, a daughter, now about twelve years of age, was awarded to the defendant. Thereafter plaintiff filed a motion in the trial court for a modification of the decree, whereby she should have the custody of the daughter, and an allowance for the support of the children. A hearing was had and the motion having been denied, plaintiff appeals.

Modified.

For appellant there was a brief and an oral argument by *Mr. Henry S. Westbrook.*

For respondent there was a brief submitted by *Messrs. Huntington & Wilson.*

BENSON, J.—1. The record in this case is neither pleasant nor wholesome literature. An extended discussion of its details here would be to perpetuate in print a history which would discredit both parties and cloud the unfortunate issue of an unhappy union. It is enough to say that we have examined the evidence with painstaking care, and are thoroughly convinced that the mother is a fit and proper person to have the custody of her daughter, and that she will thereby receive better care and culture than she would otherwise obtain. We are also of the opinion that the trial court should have made provision for the support and maintenance of the children. Taking into consideration the abundant financial ability of the father, we consider a cash payment of $6,000 a modest requirement for that purpose.

The defendant urges that this court is without jurisdiction to so modify the decree, but that question has been definitely determined by this court against defendant's contention, in *McFarlane* v. *McFarlane,* 43 Or. 477 (73 Pac. 203, 75 Pac. 139), and *Gibbons* v. *Gibbons,* 75 Or. 500 (147 Pac. 530).

A decree will be entered modifying the original decree as indicated herein, and directing the Circuit Court to appoint a suitable trustee for the proper expenditure of the money herein allowed for the nurture and education of the children.

Modified. Rehearing Denied.

McBride, C. J., Bean and Johns, JJ., concur.

Submitted on motion to dismiss appeal September 3, dismissed September 10, 1918.

MORRISON *v.* ST. JOHNS SANITARIUM.

(174 Pac. 721.)

Appeal and Error—Undertaking—Failure to Serve.

1. Where appellants regularly served their notice of appeal and filed their undertaking, but failed to serve undertaking on respondent or her attorney, and offered no excuse for such failure, the appeal will be dismissed.

From Clatsop: JAMES A. EAKIN, Judge.

On motion to dismiss appeal. Dismissed.

Mr. Edward E. Gray, for the motion.

Mr. John H. Stevenson, Mr. George Estes and *Messrs. G. C. & A. C. Fulton, contra.*

PER CURIAM.—1. The plaintiff had a decree in her favor in the court below and the defendants regularly served their notice of appeal and filed their undertaking, but failed to serve the undertaking on plaintiff or her counsel. Plaintiff moves to dismiss the appeal and affirm the decree of the court below. As no excuse is offered for the failure to serve the undertaking the appeal will be dismissed and the decree affirmed with judgment against appellants for the costs of this proceeding. APPEAL DISMISSED.

Argued April 10, affirmed April 30, rehearing allowed June 25, argued on rehearing July 17, former opinion adhered to September 10, 1918.

ROWE *v.* FREEMAN.*

(172 Pac. 508; 174 Pac. 727.)

Deeds—Understanding of Grantor—Sufficiency of Evidence.

1. In suit by a daughter to cancel her mother's deed to a son on the ground of undue influence, evidence *held* to show that the mother understood the purport of her deed when she executed it, and that she realized thereafter that her son had title to the property.

Appeal and Error—Review—Findings.

2. Some weight must be given to the fact that the lower court which saw the witnesses determined the issues in favor of defendants.

Deeds—Trust Relationship—Burden of Proof.

3. If a fiduciary relation existed between mother and son, in suit by a daughter to cancel the mother's deed to the son the burden of proof devolved on the son to sustain the transaction.

[As to presumption and burden of proof of undue influence in conveyance by parent and child, see note in **Ann. Cas.** 1915D, 711.]

Trusts—Conveyance to Trustee—Independent Advice.

4. The principle that a deed from *cestui que trust* to trustee will be upheld only when the former has acted under independent advice, applies only to cases whereby ill health, mental infirmity, immaturity or otherwise, the party whose deed is attacked is one not likely to act wisely without disinterested advice, for a party of normal mentality is entitled to dispose of his own as he sees fit.

Deeds—Trust Relationship—Evidence.

5. In a daughter's suit to cancel a deed executed by her mother to a son on the ground of undue influence and trust relationship, that the mother executed a power of attorney to the son was a circumstance to be given weight in determining whether a trust relation existed between them, but the circumstance does not, of itself, establish a fiduciary relation.

Deeds — Conveyance to Trustee — Independent Advice — Burden of Proof.

6. Where a mother constituted her son her attorney in fact by giving him power of attorney, but the only use he made of such power was the ministerial act of withdrawing a deed to the mother's land

*As to independent advice as condition of valid gift between parties occupying confidential relations, see note in 16 **L. R. A. (N. S.)** 1087. The question of presumption and burden of proof as to undue influence respecting gifts *inter vivos* from parent to child is discussed in note in 35 **L. R. A. (N. S.)** 944. REPORTER.

deposited in escrow, the power of attorney did not create such relation of trust between the mother and son that in a daughter's suit against him to cancel his mother's deed to him, executed after revocation of the power, he had the burden to prove his mother acted under independent advice.

Deeds—Conveyance to Trustee—Independent Advice—Termination of Relation.

7. If son's power of attorney from his mother created a relationship of trust between them, laying upon him the burden, in his sister's suit to cancel his mother's deed to him, to uphold the good faith of the transaction, the termination of the relation by revocation of the power of attorney destroyed the son's disqualification to deal with his mother unadvised.

Deeds—"Fiduciary Relation"—Absence of Trust or Agency.

8. Fiduciary relationship may exist in the absence of a trust or agency, being found, with its accompanying burdens and disqualifications, wherever there is confidence reposed on one side and resulting superiority and influence on the other.

Deeds—Fiduciary Relationship—Parent and Child.

9. The relation of parent and child, accompanied by the affection and companionship incident thereto, does not make the child a fiduciary within the rule casting the burden upon him to justify a deed in his favor from his parent.

Deeds—Undue Influence—Burden of Proof.

10. In a daughter's suit to cancel her mother's deed to a son, where the daughter failed to show the existence of a fiduciary relationship between mother and son, the burden of proof was on her to establish the undue influence and other matters relied on to set aside the deed.

Deeds—Undue Influence—Execution on Request.

11. The execution of a deed at the suggestion or request of the grantee, the grantor, his mother, reserving a life estate and revenues adequate to her necessities, did not constitute undue influence nor vitiate the conveyance.

Deeds—Deed from Parent to Child—Presumption of Invalidity.

12. No presumption of invalidity attaches to a deed from mother to son wherein the mother reserves a life estate and revenues adequate to her necessities, though executed without monetary consideration at the suggestion or request of the son; the mother being mentally competent and no trust relation existing.

ON REHEARING.

Deeds—Undue Influence—Fiduciary Relation—Termination.

13. On the issue of undue influence in procurement of deed from mother to son, a power of attorney from her to him, to enable him to obtain a paper put by her in escrow, and used only for that purpose, was without value as conclusive evidence of trust relation between them, where it was revoked before execution of deed.

Deeds—Fiduciary Relation—Independent Advice.

14. That the grantor has confidence in and trusts the grantee does not make independent advice a *sine qua non* to validity of deed of gift.

Deeds—Deed to Son—Presumption of Validity.

15. Presumptions, under Section 799, subdivisions 1, 19, L. O. L., of innocence of wrong and fairness and regularity of private transactions, *held* to require finding against undue influence in deed to son, with reservation of life estate, only confidence and opportunity appearing; other children being presumptively dead or near death, and testimony of fairness not being met.

From Columbia: JAMES A. EAKIN, Judge.

Department 2.

This is a suit brought to set aside a deed to six hundred and thirty-four acres of land near Scappoose, executed by Bridget M. Freeman in favor of Daniel E. Freeman, February 16, 1912. Plaintiff sues as one of the heirs at law of the grantor, who died intestate October 26, 1912. The deed in question reserved to the grantor a life estate in the property. The deed recites a consideration of one dollar and other valuable considerations, but it is conceded that no money consideration passed at the time of its execution. At the date of the deed Bridget M. Freeman had three children living: plaintiff, the defendant Daniel E. Freeman and Carrie Freeman, who died April 9, 1912. She also had a grandson, Lester Dowling, the child of a deceased daughter. The evidence is in conflict as to the age of Bridget M. Freeman. Plaintiff testifies that she was about eighty and her testimony is corroborated by that of another witness. Daniel E. Freeman testifies that his mother was sixty-eight. Other witnesses think she was about seventy.

The property in question is a dairy farm on which Bridget M. Freeman and her husband, since deceased, had resided prior to 1891. In that year they moved to Portland, leaving the farm in charge of Daniel E. Free-

man and his brother William, who died in 1897. A written lease was given these two sons. William left the farm in 1894 and thereafter the defendants Daniel E. Freeman and Mariah Freeman, his wife, resided on and farmed the property continuously except from 1898 to 1900. Although no written lease was executed subsequent to that above referred to, Daniel E. Freeman paid his mother a rental of $50 a month. This with a small pension she received was adequate to her necessities.

Plaintiff left the home of her parents in 1900. Within the next two years she wrote two letters from Baker City to the defendant Mariah Freeman. She found her way to California and was living at Healdsburg when her mother died in 1912. Except for the two letters above referred to, she had not communicated with the family in any manner since 1900. The testimony as to Lester Dowling is meager, but it sufficiently appears that he also was out of touch with the family.

A son, Jack, died in 1911 and after his death Bridget M. Freeman moved from Portland to Scappoose, remaining there until her death. At the date of the deed in question Carrie Freeman was in the last stages of tuberculosis which took her away less than two months thereafter.

The amended complaint on which the case was tried charges that the defendant Daniel E. Freeman procured the execution of the deed in question with intent to deprive plaintiff of a share of the property of her mother; that the deed was prepared at his instance in the absence of his mother; that the reservation of a life estate therein was for the purpose of plausibly representing to his mother that the instrument was only a lease; that he did so represent and that the deed

was executed by Bridget M. Freeman in the belief that she was executing a lease; that the deed was executed without independent advice as to its purport and without being read to the grantor, who could neither read nor write; that the name of the grantor was written by the defendant Daniel E. Freeman and that the grantor was induced to make her mark thereon "because of her said confidence and trust in her son and by his undue influence and persuasion upon her." Issue is joined on these allegations.

The decree of the lower court was for the defendants and plaintiff appeals. AFFIRMED.

For appellant there was a brief over the name of *Messrs. Manning, Slater & Leonard*, with an oral argument by *Mr. John Manning* and *Mr. Woodson T. Slater*.

For respondents there was a brief over the names of *Mr. W. A. Harris* and *Messrs. Cake & Cake*, with oral arguments by *Mr. Harris* and *Mr. William M. Cake*.

McCAMANT, J.—1. It appears that Bridget M. Freeman was illiterate, but the preponderance of the evidence is that she was abundantly competent and that she had a mind of her own. She was in normal health when the deed was executed; she died of pneumonia eight months thereafter.

Grant Watts, the notary public who took the acknowledgment of the deed, testifies that he had previously advised Mrs. Freeman to execute a deed to this effect, that on the day when the deed was executed Mrs. Freeman was in her right mind and seemed to know what she was doing. He further testifies that he read the deed, told Mrs. Freeman that "it was a deed with a life

lease in it"; that he (Watts) wrote Mrs. Freeman's name as a signature and made her mark, while she held the top of the pen.

E. W. Price, one of the subscribing witnesses, corroborates this testimony in part. He says, "They told me it was a deed to Dan," and that this remark was made in the presence of Mrs. Freeman. This was the only real estate which the grantor owned and she must have understood the remark as applicable to the property in question.

A. Bonser testifies that in April, 1912, Mrs. Freeman told him she had conveyed the property to Dan. On May 21, 1912, Mrs. Freeman joined with the defendants in a mortgage of the property to the Investors' Mortgage Security Company Limited. O. M. Washburn, who took her acknowledgment of the mortgage, explained to her that her signature was necessary because of her interest in the place. Mr. Washburn testifies that Mrs. Freeman said she understood the transaction.

On the other hand, Mrs. H. A. Ehlers testifies that in August, 1912, Mrs. Freeman told her: "Dan has no deed; he has only a lease." Whatever the explanation of this testimony, the preponderance of the evidence is to the effect that Mrs. Freeman understood the purport of her deed when she executed it and that she realized several months thereafter that her son Daniel E. had a title to the property.

There is evidence that Mrs. Freeman was dissatisfied with the conduct of the defendant Daniel E., but it nevertheless appears that in the last year of her life he was the only member of the family who saw anything of Mrs. Freeman, except only Carrie Freeman. This daughter died six months before her mother, after a lingering illness, during the latter part of which she

was helpless. Mrs. Freeman seems to have doubted whether plaintiff was still alive. In a letter written by plaintiff after the death of her mother she admits that she was at fault in failing to write her mother during the last twelve years of the latter's life. In another letter plaintiff intimates that she had been advised of the death of her brother Jack, who died in 1911, and that of her sister Carrie, who died in April, 1912. Plaintiff sent no message of condolence to her mother on either of these occasions. The excuses offered for this long silence are that Mrs. Freeman was illiterate and that plaintiff's relations with her sister Carrie were not cordial. There is evidence that Mrs. Freeman did not regard these excuses as adequate.

On January 17, 1911, Mrs. Freeman gave a power of attorney to Daniel E. Freeman. This instrument was recorded in the records of Columbia County January 25, 1911. On the advice of counsel who drew the deed in controversy, the power was revoked by Mrs. Freeman immediately prior to the execution of the deed. The powers granted by this instrument were very broad, but it appears by uncontroverted testimony that it was executed in order to empower Daniel E. Freeman to withdraw a deed which his mother had left in escrow with a Portland bank at a time when the sale of the property was contemplated. There is also some testimony that the power of attorney was given with a view to "some road matters down on the farm." This last circumstance explains the fact that the power of attorney was placed of record. It does not appear that the power of attorney was used except for the purpose of withdrawing the deed from the bank.

2. There is testimony to the effect that Daniel E. Freeman, prior to the bringing of this suit, offered plaintiff $10,000 for her interest in the property if she

would wait till he could sell the property. This was in the nature of a compromise offer which was not accepted. Apart from the fact that Daniel E. Freeman denies making the offer, the circumstance is unimportant. This denial is in conflict with the testimony of five witnesses and we cannot doubt that the fact is as contended by plaintiff. In this and in other respects the testimony of Daniel E. Freeman is unsatisfactory, but the controlling facts in the case are established by testimony other than that of this defendant. Some weight must be given to the fact that the lower court which saw the witnesses determined the issues in favor of the defendants: *Scott* v. *Hubbard,* 67 Or. 498, 505 (136 Pac. 653); *Hurlburt* v. *Morris,* 68 Or. 259, 272 (135 Pac. 531); *Goff* v. *Kelsey,* 78 Or. 337, 348 (153 Pac. 103); *Shane* v. *Gordon,* 84 Or. 627, 630 (165 Pac. 1167); *Tucker* v. *Kirkpatrick,* 86 Or. 677, 679 (169 Pac. 117).

3, 4. It is contended by plaintiff that a relation of trust and confidence subsisted between Daniel E. Freeman and his mother and that therefore the burden of proof devolved upon him to sustain the deed made in his favor. It is also contended that in order to sustain the deed it is essential for him to show that in executing the deed his mother acted pursuant to independent advice. If a fiduciary relation existed as contended, the burden of proof devolved on the defendants to sustain the transaction: *Jenkins* v. *Jenkins,* 66 Or. 12, 17 (132 Pac. 542); *Clough* v. *Dawson,* 69 Or. 52, 60 (133 Pac. 645, 138 Pac. 233); *Baber* v. *Caples,* 71 Or. 212, 224 (138 Pac. 472, Ann. Cas. 1916C, 1025). Plaintiff's contention as to the necessity of independent advice finds some support in *Jenkins* v. *Jenkins,* 66 Or. 12 (132 Pac. 542). Plaintiff also cites on this point *Rhodes* v. *Bate,* 1 Ch. App. 252, 257; *Haydock* v. *Haydock's Exrs.,* 34 N. J. Eq. 570, 575 (38 Am. Rep. 385);

Slack v. *Rees,* 66 N. J. Eq. 447 (59 Atl. 466, 69 L. R. A. 393); *Post* v. *Hagan,* 71 N. J. Eq. 234 (65 Atl. 1026, 124 Am. St. Rep. 997); *Hensan* v. *Cooksey,* 237 Ill. 620 (86 N. E. 1107, 127 Am. St. Rep. 345). The principle that a deed from *cestui que trust* to trustee will be upheld only when the former has acted under independent advice must be limited in its application to cases where by reason of ill health, mental infirmity, immaturity or otherwise, the party whose deed is attacked is unlikely to act wisely in the premises without disinterested advice. A party of normal mentality is entitled to dispose of his own in such manner as he sees fit: *Carnagie* v. *Diven,* 31 Or. 366, 368 (49 Pac. 891); *Dean* v. *Dean,* 42 Or. 290, 299 (70 Pac. 1039); *Reeder* v. *Reeder,* 50 Or. 204, 206 (91 Pac. 1075); *Deckenbach* v. *Deckenbach,* 65 Or. 160, 165 (130 Pac. 729); *Wade* v. *Northup,* 70 Or. 569, 578 (140 Pac. 451). While courts of equity are vigilant to redress fraud and imposition, the rules adopted for that purpose must not trench on the power of disposition which is incident to the right of private property.

5. Did Daniel E. Freeman sustain a relation of trust to his mother? The chief reliance of plaintiff on this branch of the case is on the power of attorney executed in his favor. We agree with the California Court of Appeals that this is a circumstance to be given weight in the determination of the question: *Nobles* v. *Hutton,* 7 Cal. App. 14 (93 Pac. 289). We also agree with the Pennsylvania Supreme Court that this circumstance does not of itself establish a fiduciary relation: *Crothers* v. *Crothers,* 149 Pa. St. 201, 205, 206 (24 Atl. 190).

The law applicable to the question in dispute is all based on the principle that no man can serve two masters. Where one owes a duty to another, he will not be permitted to take a position in which his interest

conflicts with his duty. He who is obligated to secure a maximum price for property will not be permitted to buy it, because of the conflict between duty and interest created by the purchase. An attorney must give disinterested service to his client, as must an agent to his principal. If, while the relation subsists, the attorney or agent secures an advantage to himself in his dealings with the client or the principal, equity will lay on him the burden of proving the transaction free from fraud and imposition. The purpose of the rule is to insure disinterested service, to protect against the misuse of a position of trust and confidence for purposes of spoliation.

6, 7. As attorney in fact for his mother, the evidence fails to charge Daniel E. Freeman with any such duty as makes the foregoing principle applicable. The only use made of the power of attorney, so far as the record shows, was the ministerial act of withdrawing a deed deposited in escrow. This act was done more than a year prior to the execution of the deed in question. The power of attorney was revoked just prior to the execution of the deed. If the relation had constituted a disqualification, its termination destroyed the disqualification: *O'Reiley* v. *Bevington,* 155 Mass. 72, 76, 77 (29 N. E. 54); *Munn* v. *Burges,* 70 Ill. 604; *Bush* v. *Sherman,* 80 Ill. 160, 171, 172; *Watson* v. *Sherman,* 84 Ill. 263, 266; *Silverthorn* v. *McKinster,* 12 Pa. 67, 71; *First Nat. Bank* v. *Bissell,* 4 Fed. 694, 698 (2 McCrary, 73); *Chatham Bank* v. *McKeen,* 24 Can. Sup. Ct. 348.

8–10. A fiduciary relation may exist in the absence of a trust or agency. It is found with its accompanying burdens and disqualifications wherever there is confidence reposed on one side and resulting superiority and influence on the other: *Walker* v. *Shepard,* 210 Ill. 100 (71 N. E. 422); *Irwin* v. *Sample,* 213 Ill. 160 (72

N. E. 687); 2 Pomeroy's Eq. Jur. (3 ed.), § 956. The evidence indicates that Bridget M. Freeman transacted very little business. Grant Watts cashed her pension checks for her. She lived simply at Scappoose on this pension and the rent paid by Daniel E. Freeman. The latter visited her from time to time, kept her supplied with fire wood and ministered to her in other respects as a son would ordinarily do for his mother. The evidence fails to show that he had an ascendancy over her mind or that his mother looked to him for counsel in respect to her property. The relation of parent and child, accompanied by the affection and the companionship incident thereto, does not make the child a fiduciary within the rule invoked: *Bonsal* v. *Randall,* 192 Mo. 525, 531, 532 (91 S. W. 475, 111 Am. St. Rep. 528); *Jones* v. *Thomas,* 218 Mo. 508, 536 (117 S. W. 1177); *Gibson* v. *Hammang,* 63 Neb. 349, 352 (88 N. W. 500); *Burwell* v. *Burwell,* 103 Va. 314, 316 (49 S. E. 68); *Mackall* v. *Mackall,* 135 U. S. 167, 172 (34 L. Ed. 84, 10 Sup. Ct. Rep. 705). Plaintiff has failed to show the existence of a fiduciary relation, and the burden of proof is therefore upon her to establish the facts relied on to set aside the deed.

11. This case is distinguished in important respects from most of the authorities relied on by plaintiff. Bridget M. Freeman did not strip herself of her property; she reserved a life estate, the revenues of which were adequate to her necessities. The importance of this circumstance is emphasized in *Post* v. *Hagan,* 71 N. J. Eq. 234, 242 (65 Atl. 1026, 124 Am. St. Rep. 997), and *Oliphant* v. *Liversidge,* 142 Ill. 160, 170 (30 N. E. 334). The deed was promptly placed of record and immediately after Daniel E. Freeman got in communication with plaintiff he advised her of its exist-

ence. The circumstantial evidence is strongly against plaintiff's contention that Daniel E. Freeman procured the execution of the deed with the fraudulent purpose of depriving plaintiff of her inheritance. The fact is that plaintiff had not been heard from for ten years; she had dropped out of the life and thought of the family. The grantor in the deed was in good health and of normal mentality at the time when the deed was executed. Mrs. H. A. Ehlers, a witness for plaintiff, testifies, "she was bright enough for her age." The grantee was not living in the same house with the grantor. In view of the circumstances the deed was a natural one for the grantor to execute. It is true that the grantee employed the attorney who drew the deed. This has been held to be a circumstance of but little significance: *Teter* v. *Teter,* 59 W. Va. 449, 463 (53 S. E. 779). It is probable that the deed was executed at the suggestion or request of the grantee. But this does not constitute undue influence, nor does it in any wise vitiate the conveyance: *In re Blair's Will,* 16 Daly, 540 (16 N. Y. Supp. 874, 876); *Doran* v. *McConlogue,* 150 Pa. St. 98, 116 (24 Atl. 357); *Schofield* v. *Walker,* 58 Mich. 96, 106 (24 N. W. 624); *Yoe* v. *McCord,* 74 Ill. 33, 44; *Teter* v. *Teter,* 59 W. Va. 449, 460 (53 S. E. 779).

"It is true that a court of equity is by the settled law of this and other states required to, and it will, scan a transaction of the kind here in question with the utmost vigilance and scrutiny. But that is an entirely different thing from presuming the existence and actual exertion of undue influence from the circumstances mentioned": *Slayback* v. *Witt,* 151 Ind. 376, 382 (50 N. E. 389).

12. No presumption of invalidity attaches to the deed in question: *Sawyer* v. *White,* 122 Fed. 223, 225 (58

C. C. A. 587). Plaintiff has failed to prove the allegations on which she relies. The decree of the Circuit Court was right and it is affirmed. AFFIRMED.

McBRIDE, C. J., and BEAN and BENSON, JJ., concur.

Former opinion adhered to September 10, 1918.

ON REHEARING.

(174 Pac. 727.)

For appellant there was a brief over the name of *Messrs. Manning, Slater & Leonard*, with oral arguments by *Mr. John Manning* and *Mr. Woodson T. Slater.*

For respondents there was a brief over the names of *Mr. W. A. Harris* and *Messrs. Cake & Cake*, with oral arguments by *Mr. Harris* and *Mr. William M. Cake.*

BURNETT, J.—The plaintiff sued to set aside a deed by her mother to her brother, the defendant Daniel E. Freeman, and to have herself decreed to be the owner of an undivided third of the land included in the conveyance. Her suit was dismissed by the Circuit Court and the decree was affirmed by Mr. Justice McCAMANT's opinion reported in 172 Pac. 508. An able petition for rehearing was granted and the cause has been argued again.

13. The former opinion contains a sufficient statement of the facts. In the petition for rehearing the plaintiff strongly urges that our estimate of the power of attorney executed by the grantor in favor of Daniel E. Freeman was erroneous. It will be recalled that the evidence was that the mother had executed a deed

to the land in pursuance of an option given to some parties to purchase the same, which conveyance was deposited in escrow with a Portland bank. After the expiration of the option she sent another son to withdraw the deed, but the bank refused to surrender it without more definite authority from the mother, on account of which she executed the power of attorney in question in favor of Daniel E. Freeman, the defendant here, after consultation with other members of her family. The only use made of the instrument was to withdraw the deed, and the defendant explains that it was placed on record because it was contemplated that he might need it to perform some acts in his mother's interest relating to roads in Columbia County, as she was at the time a resident of Portland in Multnomah County. Looking at the matter in a common-sense view, under all the testimony respecting the relations of the parties, it is plain to any unprejudiced observer that the actual confidence of the mother in the son was neither increased nor diminished by the execution of this instrument. Equity looks at the substance of things, rather than at the mere writing evidencing the conventional relationship of the parties. Under these conditions, whatever importance might be attached to the power of attorney as a legal document while it was in force was obviated by its revocation, which the witnesses agree occurred immediately prior to the execution of the conveyance attacked in this suit. The technical effect of the power is overcome by the technical effect of its revocation and it must be disregarded as a controlling factor in the contention. Its value as conclusive evidence of a fiduciary relation with all its consequences, if that term is accurately apropos, began with its execution and ended with its revocation, however much we may con-

sider it with other circumstances disclosed by the evidence.

14. For all practical purposes, on the real merits of the controversy we have before us for consideration the validity of a deed from a parent to her child. It is strongly urged that the conveyance should be destroyed because the grantor did not have competent independent advice. There are many English authorities which, under the circumstances of each particular case, hold that the lack of independent advice would be a circumstance in aid of other features affecting a conveyance by one who is under the domination of another with whom the grantor sustains a confidential relation and to whom the transfer of title is made.

The leading case on that subject is *Huguenin* v. *Baseley,* 2 L. C. in Eq. 1156, 14 Ves. Jr. 273. In that instance a widow unaccustomed to business affairs became entitled to large estates in England and Jamaica. The defendant, a clergyman in whom she had great confidence and who seems to have been her spiritual adviser, insinuated himself into her good graces and induced her to withdraw her affairs from her solicitors and confer the sole management of her estates upon him. He used this confidence and his superior knowledge of the actual situation of her holdings to procure from her an interest in the property. Lord Chancellor Eldon commented on the fact that she did not have independent advice and used it as an argument to the effect that she did not fully understand and comprehend the effect of her dealings with the defendant. Summing up the whole matter after a discussion of that fact in connection with others appearing in the record, he said:

"Repeating, therefore, distinctly, that this court is not to undo voluntary deeds, I represent the question

thus: whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature and consequences, which the defendant Baseley and the attorney were bound by their duty to communicate to her, before she was suffered to execute them; and though, perhaps, they were not aware of the duties which this court required from them in the situation in which they stood, where the decision rests upon the ground of public utility, for the purpose of maintaining the principle, it is necessary to impute knowledge which the party may not actually have had."

The essence of the discussion of the issue in that case is but a restatement in another form of the old rule, the substance of which is that if a grantor has sufficient reason and understanding to comprehend the nature, quality and consequences of the deed which he executes and the act is really his own and not virtually that of another who exercises undue influence over the grantor to that end, the deed is valid. *Huguenin* v. *Baseley* does not lay down the rule that independent advice must appear absolutely and at all events in every instance where the grantor may have special trust and confidence in the grantee, or where a fiduciary relation exists between the two.

In this country the Supreme Court of New Jersey comes nearer than any other to establishing an absolute rule that in such cases the grantor must have had independent advice. The leading case from that state is *Slack* v. *Rees,* 66 N. J. Eq. 447 (59 Atl. 466, 69 L. R. A. 393). There the grantor was sixty-eight years of age and long had suffered from *locomotor ataxia,* which affected both his mind and body. The deed in question was executed the day before his death. For nearly three months prior to that event he was an inmate of the home of his daughter, the grantee,

and was dependent upon her for the care and service which one in his condition constantly requires. The court found that the relation of the parties had become reversed, so that she was really his guardian. On the ground that the conveyance stripped the grantor of all his property and that he did not have independent advice respecting the execution of the instrument, the court set it aside.

Other cases from New Jersey are *Haydock* v. *Haydock's Exrs.*, 34 N. J. Eq. 575 (38 Am. Rep. 385), where the grantor was an old man devoid of mental capacity and clearly under the domination of his wife, without memory of what he had already done in the matter of conveyancing, and *Albert* v. *Haeberly*, 68 N. J. Eq. 664 (61 Atl. 380, 111 Am. St. Rep. 652), where the gift was by a girl to her stepmother, with whom she had lived since she was two years old, and the deed was made two months after the grantor became of age and while still a member of the grantee's family. It will be noted that this latter case is an instance of a gift from a child to one standing *in loco parentis*. In *Coffey* v. *Sullivan*, 63 N. J. Eq. 296 (49 Atl. 520) a grantor was in some degree enfeebled both mentally and physically and had not the benefit of independent advice. The grantee endeavored to keep the grantor away from others of the family and did many things to conceal the conveyance, and there were other elements of suspicion surrounding the transaction. In that case the court stated the rule in this more modified form:

"The burden of proof was cast upon the donee to establish that the donor fully appreciated what he was doing, *or* at all events, in the doing had the benefit of disinterested and competent advice."

New Jersey stands practically alone in this country in its treatment of the doctrine of independent advice. *Woodbury* v. *Woodbury,* 141 Mass. 329 (5 N. E. 275, 55 Am. Rep. 479), is an authority for submitting the lack of advice as a circumstance to be considered by the jury. The rule is thus stated in the alternative in *Hensan* v. *Cooksey,* 237 Ill. 620, 626 (86 N. E. 1107, 127 Am. St. Rep. 345), cited by the plaintiff:

"The existence of the confidential relation creates a presumption of influence, which imposes upon the one receiving the benefit the burden of proving the absence of undue influence by showing that the other party acted upon the competent and independent advice of another, or such facts as will satisfy the court that the dealing was at arm's-length, or that the transaction was had in the most perfect good faith on his part and was equitable and just between the parties; or, as some of the authorities say, that it was beneficial to the other party."

In *Gibson* v. *Hammang,* 63 Neb. 349 (88 N. W. 500), noted in plaintiff's brief, the grantor was seventy-eight years old and much enfeebled by illness. The grantee, a daughter, was very importunate, made railing accusations against her brothers and sisters, represented that they were about to have a guardian appointed for the grantor, her mother, concealed the project from a brother living in the same house and from others of the family, especially a sister living near. In *Disch* v. *Timm,* 101 Wis. 179 (77 N. W. 196), a husband conveyed property to his third wife through her son-in-law. The grantor was enfeebled by cancer of the stomach and under the influence of opiates and other sedatives. The grantee had divorced two former husbands, kept a saloon and was of a domineering disposition. The son-in-law prepared both deeds, one to himself and the other from himself to the

grantor's wife. She and her children virtually made the grantor's children leave home, although the latter were always on good terms with the grantor and attentive to him; prevented all private communication between him and them and kept the deeds a secret until the day after the death of the grantor, when they recorded them. In practically all of the cases cited as precedents by the plaintiff there was evidence of pronounced mental weakness on the part of the grantor, coupled with the circumstance that the grantee used the confidential relation for the purpose of unduly influencing the grantor and was likewise guilty of deceit and concealment.

In treating of transactions between parties between whom a fiduciary relation exists, the rule is thus stated in 2 Pom. Eq. Jur. (3 ed.), Section 958:

"There is, however, no imperative rule of equity that a transaction between the parties is necessarily, in every instance, voidable. It is possible for the trustee to overcome the presumption of invalidity. If the trustee can show, by unimpeachable and convincing evidence, that the beneficiary, being *sui juris*, had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all the knowledge or information concerning the property possessed by himself, or which he might, with reasonable diligence, have possessed, and that he has obtained no undue or inequitable advantage, and especially if it appears that the beneficiary acted in the transaction upon the independent information and advice of some intelligent third person, competent to give such advice, then the transaction will be sustained by a court of equity."

In succeeding sections the learned author relaxes the rule somewhat as between principal and agent, emphasizes it with reference to guardian and ward, and when he comes to the relation between parent and child, in Section 962, he uses this language:

"Transactions between parent and child may proceed upon arrangement between them for the settlement of property or of their rights in property in which they are interested. In such cases courts of equity regard the transactions with favor. They do not minutely weigh the considerations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction. * * Where the positions of the two parties are reversed, where the parent is aged, infirm or otherwise in a condition of dependence upon his own child, and the child occupies a corresponding relation of authority, conveyances conferring benefits upon the child may be set aside. Cases of this kind plainly turn upon the exercise of actual undue influence, and not upon any presumption of invalidity; a gift from parent to child is certainly not presumed to be invalid."

From these excerpts it is plain that the text-writer does not make independent advice a *sine qua non* the absence of which alone will vitiate a conveyance, at least from parent to child. A well-considered case on this subject is *Zimmerman* v. *Frushour,* 108 Md. 115 (69 Atl. 796, 15 Ann. Cas. 1128, 16 L. R. A. (N. S.) 1087). In that case the grantor had lived as a housekeeper in the family of the grantee's parents from his birth continuously to the time he was married, after which she lived in his household. She had nursed him from babyhood and thought as much of him as if he were her own child. When he came to manhood she intrusted to his keeping all her money and other property and relied upon him for advice and direction in all her business transactions. A more complete case

of confidential relation could hardly be made out. The court reviewed the English and American precedents at great length and reached the conclusion that it is not essential in all cases for the donor to have independent advice before making a gift to one in whom he has extreme confidence. The annotator in the L. R. A. report of the case thus states the result of his examination of the authorities:

"That the question whether or not such advice was given is a material one, to be considered with other surrounding facts and circumstances, such as the nature and purpose of the gift and the condition and the relation of the parties, is readily conceded by all courts. That the donor had independent advice relating to the gift is generally recognized as a strong circumstance rebutting the presumption of undue influence that might be raised by reason of the relation of the parties. It is equally true that the failure of the donor to secure independent advice may tend strongly to show undue influence, especially if such failure was due to the persuasion or conduct of the donee. It is not, however, generally held that a necessary condition of a valid gift between parties occupying confidential relations toward each other is the interposition and advice of a third person in behalf of the donor."

Even in New Jersey, in the case of *James* v. *Aller*, 68 N. J. Eq. 666 (62 Atl. 427, 111 Am. St. Rep. 654, 6 Ann. Cas. 430, 2 L. R. A. (N. S.) 285), the court found no difficulty in sustaining a gift of substantially all his property by a father to his daughter on the eve of his second marriage, although it did not appear that he had independent advice concerning the transaction. Again, in *Groff* v. *Stitzer*, 75 N. J. Eq. 452 (72 Atl. 970), the court held in substance that where the grantor does not dispose of all his property the doctrine of "independent advice" does not apply in all

its force as taught in such cases as *Slack* v. *Rees,* 66 N. J. Eq. 447 (59 Atl. 466, 69 L. R. A. 393), and *Post* v. *Hagan,* 71 N. J. Eq. 234 (65 Atl. 1026, 124 Am. St. Rep. 997). In *Soper* v. *Cisco,* 85 N. J. Eq. 165 (95 Atl. 1016, Ann. Cas. 1918B, 452), the mother grantor had lived with and depended upon the daughter grantee, and conveyed the property, one tract for $50 and the other for $300 and "support during her natural life." The latter tract was worth about $5,000. No effort was made to conceal the transaction nor to keep the grantor from seeing other children and advisers. She was seventy-seven years of age and of usual health of body and mind, and lived with the daughter for sixteen years after the deed was made, when she became dissatisfied at necessary restraint placed upon her owing to her then enfeebled mental condition, and left, bringing the suit to set aside the deeds. The court held:

"That the bargain was a natural and provident one for the mother to make and was not the product of undue influence, and will not be set aside for failure to show that the mother had independent advice."

In that case the court laid down this maxim:

"The test of mental capacity to make a deed is that a person shall have ability to understand the nature and effect of the act in which he is engaged and the business which he is transacting."

Ralston v. *Turpin,* 25 Fed. 7, is a case where the effort was to set aside certain deeds of gift made to the respondent by the husband of the complainant, who claimed as his widow. The grantee in the conveyance had been an intimate friend of the grantor's family, had acted for his mother in a fiduciary capacity, had been guardian of the grantor and later on, after

the latter attained majority, had acted as his general agent under power of attorney. The deed was to the grantee as trustee for his own children and was designed as a bounty for the *cestuis que trustent.* Quoting from the syllabus, it was held:

"A gift by a principal to an agent is valid, unless the party who seeks to set it aside can show that some advantage was taken by the agent of the relation in which he stood to the donor. If it appears that the conduct of the agent is fair, honest, and *bona fide,* it is immaterial that the deed of gift may have been drawn up by his solicitor without the intervention of a third party."

This case was affirmed on appeal to the Supreme Court of the United States in *Ralston* v. *Turpin,* 129 U. S. 663 (32 L. Ed. 747, 9 Sup. Ct. Rep. 420). Appended to the report of the case in 25 Federal Reporter is a valuable note differentiating two classes of confidential relations. In brief, the distinction is between such relations as guardian and ward, trustee and *cestui que trust* on the one hand, and principal and agent, parent and child and such like on the other, the reason for the difference being that in the first class the trustee or guardian has authority over the property of the beneficiary which cannot be revoked at the pleasure of the latter, whereas in the other relations mentioned there is no irrevocable authority over the property of the beneficiary, but he is at liberty to terminate the power at pleasure. The annotator reviews many authorities and contrasts *Huguenin* v. *Baseley* with *Hunter* v. *Atkins,* 3 Mylne & K. 134, which latter concerned a gift by a client to his solicitor, which was sustained. In *Carney* v. *Carney,* 196 Pa. St. 34 (46 Atl. 264), it was held that a child may accept a gift from his parent without being obliged to show that the grantor was

free from undue influence or that the conveyance was fair, and the want of independent advice was held to be no obstacle to the transaction. In *Naeseth* v. *Hommedal,* 109 Minn. 153 (123 N. W. 287), the want of independent advice was considered only as a circumstance in connection with other features.

According to the great weight of authority, it is not reasonable to hold that because A has confidence in and trusts B the former is under such disability that he cannot give the latter anything unless he is able to, and does, find some stranger who will advise the execution of the gift. The circumstance of want of independent advice is nearly always found as an auxiliary or makeweight to a decision where there is a defect of mental capacity or other conditions which of themselves tend to nullify the questioned transaction. Aside from the New Jersey precedents, which are weakened by other decisions of the same court, there is no well-considered case in this country which holds that such counsel is a *sine qua non* like the writings required by the statute of frauds or the production of more than one witness to prove usage or treason.

15. The essence of the charge against the defendant is that without any authority or direction from his mother and without her knowledge or consent the grantee procured an attorney to prepare a deed conveying the legal title from his mother to him, which he reported to her was a lease of the premises; that he did not read it to her or clearly explain to her the legal effect thereof, but told her that it was a lease, and on account of her confidence in him she relied upon his word, being illiterate and unable to read the instrument. The only direct testimony on this subject is that of the defendant grantor, who says that his mother directed him to have such a deed drawn, in pur-

suance of which instruction he had an attorney prepare the same and send it to him, after which he read it in full to his mother. She, herself, had several days prior thereto talked to the disinterested witness Watts about such a method of disposing of her property when he informed her that a like procedure had been adopted in his own family before that time. At the immediate execution of the instrument he told her that it was a deed with a life lease in it. She was then in her usual health, and the principal witness for the plaintiff, Mrs. Ehlers, says in substance that the old lady was mentally as well as ever.

The complaint does not charge mental incapacity of the grantor beyond what may be implied from her illiteracy. The gist of the accusation is that the grantee reported the instrument to be a lease when in fact it was a deed. There is utterly no testimony whatever in the record tending to show that the defendant grantee made any such representation to his mother. On the contrary, his testimony is to the effect that he read the instrument to her at large and explained its meaning. That she understood the effect of the instrument is corroborated by the testimony of Watts, in substance, that he stated to her what it was and that she had previously talked to him on that subject.

Undue influence is made an incident of the plaintiff's case by the following averment of her complaint:

"And because of her said confidence and trust in her son and by his undue influence and persuasion upon her, she did not protest against his following acts respecting a pretended execution of said deed: That thereafter said defendant took his mother to the store of J. G. Watts in Scappoose, Oregon, who was a notary public, and there without reading or further explaining said instrument to her, and in the presence of said notary, himself wrote his mother's name at

the foot of said pretended deed and caused her to make her mark thereupon near where he had written her name. * * "

The only other acts of the defendant there averred being his request that the notary certify the acknowledgment of the deed and that the grantee filed it for record. Beyond controversy, the notary, not the defendant, wrote the grantor's name and she held the top of the penholder as her mark was made, all after the officer had explained to her that the writing was "a deed with a life lease in it." It is not necessary, however, to rest the conclusion of this branch of the case on the contradiction of the plaintiff's allegation by the testimony. It may be conceded that the defendant's relation to his mother was more intimate than that of the plaintiff and that he enjoyed his parent's confidence more than any other person. That is the most the plaintiff has proved, yet that does not of itself establish fraud or undue influence.

In *Sawyer* v. *White,* 122 Fed. 223 (58 C. C. A. 587), the plaintiff attacked a deed to the defendant executed by the latter's father, a paralytic eighty-eight years of age. It was averred that the grantor had not sufficient mental capacity to execute the conveyance, that the grantee was the confidential adviser and the manager of the property of the grantor and that he procured the deed by undue influence. The opinion of Mr. Justice SANBORN on that point contains this language:

"There is no doubt that he was influenced to do so by his affection for and confidence in his son and by his gratitude to him for his years of devotion and service. But hatred or indifference is not indispensable to the validity of a gift, nor is gratitude or affection for the grantee fatal to it. * *

The natural influence of the affection of a parent for a child is neither fraudulent nor illegal. * * Nor is the fact that the grantee or devisee occupies a fiduciary relation to his grantor or testator necessarily fatal to the gift. It is the use of that relation to secure a deed or devise against the free will or desire of the grantor or donor, and not the mere existence of the relation, that vitiates a grant. It is true that when an unnatural or unreasonable gift or devise is made—such as one by a ward to his guardian, or by a helpless invalid to his nurse, or by a client to his trusted attorney—the presumption at once arises that the fiduciary relation was used to overcome the will of the grantor and that the deed or devise is voidable. But when the natural gift of a parent to a loved and trusted child is in question, this presumption is met and overcome by the still stronger presumption that such a gift is the natural and reasonable act of the parent, and that the free will of the donor inspired the grant, uninfluenced by the trust relation."

In *Nicholson* v. *Duff*, 189 Mo. App. 47 (174 S. W. 451), a transaction was upheld where the donor at the age of seventy-five years gave to her daughter a promissory note of a large amount and the transaction was held not to be affected by the fact that the daughter was caring for her mother, accompanied her to the bank where the mother got the note and to a lawyer, before whom the mother assigned it to her as a gift. It was held also that all these circumstances raised no presumption of confidential relation or undue influence: See, also, *Towson* v. *Moore,* 173 U. S. 17 (43 L. Ed. 597, 19 Sup. Ct. Rep. 332); *Bonsal* v. *Randall,* 192 Mo. 525 (91 S. W. 475, 111 Am. St. Rep. 528); *Mallow* v. *Walker,* 115 Iowa, 238 (88 N. W. 452, 91 Am. St. Rep. 158); *McFarland* v. *Brown* (Mo.), 193 S. W. 800; *Sappingfield* v. *Sappingfield,* 67 Or. 156 (135 Pac. 333); *Tenbrook* v. *Brown,* 17 Ind. 410; *Teegarden* v.

Lewis, 145 Ind. 98 (40 N. E. 1047, 44 N. E. 9); *Kennedy* v. *McCann,* 101 Md. 643 (61 Atl. 625); *Prescott* v. *Johnson,* 91 Minn. 273 (97 N. W. 891); *Burwell* v. *Burwell,* 103 Va. 314 (49 S. E. 68); *Turner* v. *Gumbert,* 19 Idaho, 339 (114 Pac. 33).

What, then, is the situation with which the grantor was confronted? All her children, except three, were in fact dead. Her daughter Carrie, a spinster, was as good as dead from the ravages of tuberculosis and succumbed to that disease within two months after the execution of the deed. The plaintiff had gone away to parts unknown and had not been heard of for more than ten years. Under such circumstances the presumption of law is that she was dead also: Section 799, subd. 26, L. O. L. If we may credit Mrs. Ehlers, the principal witness for the plaintiff, after the death of Carrie the old lady said that she had buried all her children except one. This indicates the legitimate attitude of her mind in the premises. It was thus naturally apparent to the mother when she made the deed that she had but two living children and one of them was even then almost *in articulo mortis.* The defendant had remained near his mother and given her the attention of a dutiful son. They had always lived apart, so that she was as independent of him as any other parent would be of an attentive child. It was natural that the mother would want him to have the farm upon which he had worked so long. She did not strip herself of the entire property, as appears in almost every case cited by the plaintiff. On the contrary, she reserved the use of all of it during her life. No effort was made on behalf of the defendant to keep her away from the plaintiff or from those who would give her independent advice. She knew all about the situation, and the natural objects of her bounty, as

well as he did. There is no evidence of concealment by the defendant of anything that would in the least affect the transaction. There is nothing to dispute the testimony of the defendant and those present at the execution of the instrument. All that is shown in opposition is that the defendant had the opportunity to act as the plaintiff charges he did. The law comes to his aid in that state of affairs and in addition to his own and other testimony presumes him innocent of wrong and that the transaction in question is fair and regular: Section 799, subds. 1, 19, L. O. L. Under the circumstances, it was a natural disposition for the mother to make of her property, to give it to the only one of her family who seemed at all likely to survive her, so far as she knew. In the language of the Code the presumptions noted above are satisfactory and they are sufficient to turn the scale in favor of the defendant, even on the theory that the burden of proof devolves upon him. The conveyance thus appears to be the legitimate and normal result of the ordinary relation of parent and child. The conclusion is the more satisfactory because it follows that of the trial judge, who heard and saw the witnesses, and it ought not to be disturbed at the suit of the daughter who utterly neglected her mother for more than a decade and emerged from the obscurity she had drawn around herself only after death had claimed the parent and her property became available. We adhere to the former opinion. FORMER OPINION ADHERED TO.

Argued July 18, affirmed September 10, 1918.

HOOD v. SEACHREST.

(174 Pac. 734.)

Limitation of Actions—Accrual—Discovery of Fraud.

1. Running of statute in action at law for fraud and deceit is not postponed to discovery of fraud, in view of Section 3, L. O. L., basing limitations in actions at law from accrual of cause of action with exceptions, but none as to fraud, and Section 391, making such exception in suit for fraud.

[As to fraud at law as preventing the operation of the statute of limitations, see note in 60 **Am. Dec.** 511.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

This is an action for damages for fraudulent misrepresentations.

The complaint, which was filed on February 24, 1917, alleges in substance, that on March 1, 1910, the defendant and three others were the joint owners of certain lands, the record title to which was in Nelson Fleming; that on that day, influenced thereto by the solicitations and representations of the defendant, plaintiff entered into a contract for the purchase of a portion of such land known as Tract 71, containing 13.31 acres, upon which she made an initial payment of $500, and thereafter made the deferred payments as they matured, aggregating $1,667.75, and on March 19, 1913, received a deed therefor. It is then stated,

"that the plaintiff entered into said contract and purchased said tract of land because of and by reason of the statements and representations made by the defendant to the plaintiff with reference to and concerning the character, quality, location and nature of said land, and the nature and adaptability of the soil

thereof for the growing of apples, and the maintenance of a commercial apple orchard thereon, and because of the representations of said defendant with reference to and concerning the number of acres in said tract planted to apple trees, and the quality of said apple trees, and other statements and representations of material facts hereinafter set out."

Then follow detailed averments of false statements, among which are: That 9½ acres of the tract were planted in apple trees of the choicest varieties for commercial purposes, when in fact there were not more than seven acres of apples, of inferior varieties wholly unsuitable for a commercial orchard; that defendant was experienced in and thoroughly familiar with the business of growing and marketing apples, that he knew the quality, character and nature of soil requisite for the successful growing of apples for the market; that he was familiar with the soil of the Hood River district and that Tract 71 was superior thereto in every particular; that said tract of land was a first-class apple orchard and ideal for the maintenance of a commercial orchard, when, in fact, it is located on the south slope of a steep hill, exposed to an ocean breeze, and is wholly worthless for the purpose of growing apples; that by the time the trees were five years old they would produce a full crop of apples, which, at normal prices, would be worth from three to five thousand dollars, if plaintiff would follow the advice and directions of defendant in the care and cultivation of the orchard; that plaintiff did follow the advice and directions of defendant, but that the orchard has never produced any fruit, although now more than seven years old. There are several other allegations of false and fraudulent statements made by defendant, but it is not necessary to enumerate them.

It is alleged that these statements were known by the defendant to be false when he made them, and that they were made for the purpose of inducing the plaintiff to purchase the land; that she relied upon them, was deceived thereby, and suffered the consequent damage for which she seeks compensation.

It is further averred that at the time of entering into the contract, plaintiff was a new-comer in Oregon, ignorant of the kind of soil and climatic conditions necessary for successful apple production, and had no knowledge as to the character or location of said tract, all of which was known to defendant, who knew that plaintiff relied wholly upon his statements and intended that she should; that upon the failure of the orchard to produce a crop when it was five years old, plaintiff inquired of defendant as to the reason therefor and he told her that the trees had been purposely pruned back and prevented from bearing while young in order that they might bear more abundantly when older, and, relying upon this explanation, plaintiff made no further investigation, but relied wholly upon defendant's statements, and continued to do so until the summer of 1916, when said orchard again failed to produce fruit, when she began an investigation and discovered, for the first time, that she had been defrauded. There are several elements of damage upon which plaintiff seeks to recover, such as the difference between the purchase price of the land and its actual value, the interest thereon, the money expended in cultivation, and the difference between the value of the land as it was represented, and its actual value. Defendant filed a demurrer to the complaint as follows:

"(1) That there is a defect of parties defendant.

"(2) That several causes of action have been improperly united.

"(3) That the complaint does not state facts sufficient to constitute a cause of action against the defendant.

"(4) That the action has not been commenced within the time limited by code of the State of Oregon.

"(5) The complaint shows on its face that 3 years and 19 days after the plaintiff entered into a written contract with Nelson Fleming, for the purchase of the land, about which she alleges the defendant made false and fraudulent representations, plaintiff ratified said agreement, surrendered said agreement, and received a deed and title to said land.

"(6) That the complaint shows on its face that the action is for fraud and there is no allegation of rescission of the contract, or restitution.

"(7) The complaint shows on its face that the cause of action, if any, arose prior to March 1, 1910, and by paragraph XIII, the defendant is to be charged with the default and miscarriage of another: Section 808, subdivision 3.

"(8) The complaint attempts to allege an injury to the rights of the plaintiff by defendant, not arising on contract, and under Section 8, L. O. L., the action is stale and should be dismissed."

This demurrer was sustained by the trial court, and plaintiff refusing to plead over, there was a judgment for defendant, from which plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Nels Jacobson* and *Mr. T. M. Morris,* with an oral argument by *Mr. Jacobson.*

For respondent there was a brief over the names of *Mr. James N. Davis* and *Mr. W. W. Dugan, Jr.,* with an oral argument by *Mr. Davis.*

BENSON, J.—1. There is but one point in the demurrer which possesses any merit, and that is the con-

tention that the statute of limitations has run against plaintiff's cause of action, and this is the only question which we deem it necessary to consider. In doing so, it may be remarked that in the investigation of this subject we have received no assistance whatever from the brief of either party. It is conceded that Section 8, L. O. L., fixes two years as the time within which actions of this character must be begun, and the complaint discloses that the false representations are charged to have been made in March, 1910, and that this proceeding was not begun until February, 1917.

Plaintiff contends that in actions for fraud and deceit the statute of limitations does not begin to run until the injured party discovers the falsity of the representations, or could have done so by the use of due diligence. While this position is uniformly held to be correct as regards suits in equity, there is much conflict in the authorities as to its application in actions at law. There is much variety in the phraseology of the several statutes, and still greater variety in the reasoning of the courts in reaching their contrary conclusions. In many of the states the interpretation of the law which is urged by plaintiff has been expressly adopted by statute. In many others it has been held, in the absence of a statutory provision to the contrary, that the limitation of time begins to run as soon as the right of action accrues, and that this occurs when the injured party acts upon the fraudulent representations.

Our own statute reads as follows:

"Actions at law shall only be commenced within the periods prescribed in this title, after the cause of action shall have accrued; except where, in special cases, a different limitation is prescribed by statute. But the objection that the action was not commenced within the

time limited, shall only be taken by answer, except as otherwise provided in Section 68'': Section 3, L. O. L.

This section is followed by the various time limits, and then by the exceptions, of persons under disability such as minors, insane persons, those imprisoned on criminal charges, etc., but no mention is made of cases involving fraud and deceit. This legislation was enacted as a part of the Civil Code in 1862, and as a part of the same act, we find Section 391, L. O. L., which reads, in part, as follows:

"A suit shall only be commenced within the time limited to commence an action as provided in Chapter II of Title I of this Code; * * . In a suit upon a new promise, fraud, or mistake, the limitation shall only be deemed to commence from the making of the new promise or the discovery of the fraud or mistake."

When we read these two sections together, it is obvious that the legislature intended that the rule adopted in law actions is to differ from the one followed in suits in equity. It will also be observed that while exceptions to the general effect of Section 3, L. O. L. were considered by the legislature, the Code is silent as to any exception in the case of fraud and deceit. This also is a convincing fact in the discussion. In *Swickard* v. *Bailey,* 3 Kan. 507, 513, the court, in discussing this question, says:

"This action shows conclusively that the legislative mind was directed to the subject we are considering. The provision is not as broad as in the judgment of many it should be, but the fact that any exception at all was made, is strong evidence that no other or greater one was intended. At all events, according to the most familiar of the canons of interpretation, the court is bound to say, that having mentioned one exception, all others were intended by the legislature to be excluded."

We conclude, then, that in the present case, the plea of the statute of limitations was well taken, and the demurrer properly sustained. The judgment is affirmed. AFFIRMED.

BURNETT, HARRIS and JOHNS, JJ., concur.

Argued June 19, modified September 10, 1918.

SCHLUSSEL *v.* HAYS.

(174 Pac. 722.)

Specific Performance—Parol Agreement—Interest in Land.

1. In order that a parol agreement, creating an interest in real property, may be enforced, it must be clear, definite, just, reasonable and mutual in all its parts.

[As to certainty in contract as requisite for specific performance, see note in 26 Am. Dec. 661. As to mutuality of contract as requisite for specific performance, see note in 7 Am. Dec. 492.]

Specific Performance—Confidential Relationship of Parties—Presumption of Invalidity.

2. Where plaintiff assisted sixty-nine year old widow in the management of her property, secured tenants, collected rents and advised her in business matters, the relationship was confidential, and latter's parol agreement to convey land to former in suit for specific performance is presumed to be invalid.

Specific Performance—Degree of Proof—Presumption of Invalidity.

3. In action for specific performance of parol agreement to convey land, where plaintiff had for many years assisted promisor in the management of her property and advised her concerning her business affairs, the presumption of invalidity of the agreement raised by confidential relationship of the parties can be overcome only by clear proof of good faith of former and full knowledge and independent consent of latter.

Principal and Agent—Principal's Agreement to Convey to Agent—Independent Advice of Third Person.

4. Independent advice of a third person is not essential to support principal's agreement to convey land to his agent for a fair consideration.

Specific Performance—Sufficiency of Evidence—Parol Agreement to Convey.

5. In action for specific performance of parol agreement to convey bungalow, evidence *held* to show that owner agreed to convey bunga-

low to plaintiffs in consideration of their being married and boarding and caring for her the remainder of her life.

Descent and Distribution—Liability of Heir for Ancestor's Debt.

6. In action for specific performance of agreement to convey bungalow, brought after promisor's death, plaintiffs cannot recover judgment for unpaid installments on bungalow against promisor's heir under Section 491, L. O. L., making heir liable for ancestor's debts to extent of real estate inherited, where it does not appear that personal assets of the estate were insufficient to pay such debt under Section 492.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 1.

This is a suit for the specific performance of an oral agreement to convey land. Josephine Leach had conducted a rooming and boarding house on Park Street in Portland for about six years prior to making the agreement sued upon; and Mark Schlussel, to whom she was affianced, had been one of her roomers and boarders for more than five years. Josephine Leach did not own the building in which she conducted her business but she did own and had paid about $4,000 for the furnishings used in the house. Mrs. Margarette Butrick was a widow, aged about 69 years, and had lived for about three or four months in rented rooms, which she had furnished, in a house on Lownsdale Street in Portland. Edward Hays is a son and the sole heir of Margarette Butrick. On the 8th or 9th of January, 1915, Mrs. Butrick moved from the rooms which she had been occupying on Lownsdale Street to the rooming-house conducted by Josephine Leach.

In 1910 the owner of Lot 6 in Block 38 in Rose City Park agreed to sell that property to William F. Gwin and wife for $4,000 to be paid in specified monthly installments. The contracting purchasers were entitled to possession of the premises so long as they paid the installments when due. On December 17, 1914, the

Gwins, who up to that time had paid the monthly installments as they matured, assigned their contract to Mrs. Butrick. A bungalow stood upon the lot and for that reason the property is frequently referred to in the record as the bungalow. Mrs. Butrick owned considerable property and Mark Schlussel had assisted in managing her property for about twelve years by securing tenants, arranging for leases, collecting rents and advising her concerning her business affairs. On January 15, 1915, Mrs. Butrick moved from Josephine Leach's boarding-house to the bungalow and continued to reside there until the date of her death, which occurred on July 20, 1915.

Josephine Leach and Mark Schlussel were married on January 30, 1915, and on the same day they moved into the bungalow where they are still residing. The Schlussels boarded and cared for Mrs. Butrick from the date of their marriage until the time of her death.

Claiming to be the owner of the bungalow as the sole heir at law of Mrs. Butrick, Edward Hays began an action in ejectment against the Schlussels to oust them from the premises; and the Schlussels then commenced this suit by filing a complaint in the nature of a cross-bill in equity.

The plaintiffs aver that Mrs. Butrick made an offer to them that if Mrs. Schlussel (then Josephine Leach)

"would give up the boarding and lodging house, sell her furniture and she and the plaintiff, Mark Schlussel, would marry and together make a home for, take care of, board and lodge the said Margarette Butrick during the remainder of her natural life in the bungalow * * she would in consideration thereof give them" the bungalow.

The complaint alleges that

"the plaintiffs, after due consideration of said offer, agreed to same in consideration thereof and as a part

of said agreement, the said plaintiff, Josephine Schlussel, disposed of all the furniture in said premises on Park Street, except what she moved into the bungalow, at a great sacrifice."

The plaintiffs also allege that possession of the bungalow was delivered to them on January 30, 1915; that they made and paid for permanent improvements, with the knowledge and consent of Mrs. Butrick, by planting shrubbery, enameling the kitchen, decorating the bedrooms, improving the woodwork and installing electric wirings.

The answer states that Mark Schlussel had for a long time acted as the agent of Mrs. Butrick in the management of her property

"and in the course of said relations said Mark Schlussel acquired great personal influence over said Margarette Butrick, and by reason thereof said Margarette Butrick had and reposed great confidence in said Mark Schlussel; that by reason of the premises there existed at the time of the making of the alleged contract set forth in the complaint, and had existed for some time prior thereto, a confidential relation; that if any promise was ever made by said Margarette Butrick to plaintiffs, as alleged in plaintiffs' complaint, it was made by her at the suggestion, persuasion and undue influence of the said Mark Schlussel to and upon her, and without first having the advice and counsel of any disinterested person, and for that reason was not a binding contract in equity."

Continuing, the answer relates that the plaintiffs complained to Margarette Butrick that the boarding-house was not paying and that they desired to discontinue the business and

"that thereupon said Margarette Butrick offered to them that in the event they intermarried and closed their said boarding and lodging house, they might live with her in her bungalow, in consideration that they

would board her and maintain said house in payment of rent"; and that "the plaintiffs occupied said premises with said Margarette Butrick until the time of her death, upon the said understanding and agreement that they were to board said Margarette Butrick and maintain said home for her in payment of rent and not otherwise."

The decree of the trial court was for the plaintiffs and the defendant appealed. MODIFIED.

For appellant there was a brief over the name of *Messrs. Manning, Slater & Leonard,* with an oral argument by *Mr. Woodson T. Slater.*

For respondents there was a brief over the name of *Messrs. Bernstein & Cohen,* with an oral argument by *Mr. Alex Bernstein.*

HARRIS, J.—In brief, the contention of the plaintiffs is that Mrs. Butrick agreed to convey the bungalow to them if they would board and care for her during the remainder of her life; and that after having taken possession of and permanently improved the premises with the knowledge and consent of Margarette Butrick and after having fully performed their part of the agreement, they are entitled to a conveyance of the property in fulfillment of the agreement made by Margarette Butrick. The position of the defendant is that his mother retained possession of the bungalow and merely permitted the plaintiffs to occupy the premises with her with the understanding that they could pay rent by boarding and caring for her; that if his mother did in truth promise to convey the property to the plaintiffs such promise was induced by undue influence exercised by Mark Schlussel while occupying a confidential relation; and that, therefore, upon the death of his mother he became the owner of her interest in the bungalow.

There are two questions of fact to be decided: (1) Did Mrs. Butrick agree to convey the property to the Schlussels as alleged by them? And if she did so agree (2) was the agreement brought about as claimed by the defendant? Before attempting to ascertain the ultimate facts, attention should first be directed to certain rules which govern the parties and control the court.

1–4. In order that a parol agreement creating an interest in real property may be enforced, it "must be clear, definite, just, reasonable and mutual in all its parts": *Tucker* v. *Kirkpatrick,* 86 Or. 677, 681 (169 Pac. 117). A confidential relation subsisted between Mark Schlussel and Mrs. Butrick and therefore equity raises a presumption against the validity of the agreement sought to be enforced; and before the Schlussels can prevail they must overcome this presumption by affirmatively proving compliance with equitable requisites: 2 Pom. Eq. Jur. (3 ed.), §§ 956 and 959; *Gilmore* v. *Burch,* 7 Or. 374, 384 (33 Am. Rep. 710); *Jenkins* v. *Jenkins,* 66 Or. 12, 17 (132 Pac. 542); *Clough* v. *Dawson,* 69 Or. 52, 60 (133 Pac. 345, 138 Pac. 233); *Baber* v. *Caples,* 71 Or. 212, 225 (138 Pac. 472, Ann. Cas. 1916C, 1025). The presumption of invalidity raised by the law

"can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action": 2 Pom. Eq. Jur. (3 ed.), § 957.

When a principal conveys land to his agent

"and the principal on his side acted with full knowledge of the subject matter of the transaction and of the person with whom he was dealing, and gave a full and free consent,—if all these are affirmatively proved, the presumption is overcome, and the transaction is valid": 2 Pom. Eq. Jur. (3 ed.), § 959.

Whatever the rule may be with reference to independent advice where a *cestui que trust* makes a gift to the trustee or whatever the rule may be where the principal confers a bounty upon the agent, independent advice of a third person is not essential to support an agreement of a principal to convey land to his agent for a fair consideration: 2 Pom. Eq. Jur. (3 ed.), pp. 1758, 1759, and notes.

5. All parties concerned admit that the Schlussels and Mrs. Butrick made some sort of an agreement. The dispute relates to the terms of the agreement. The Schlussels say that the bungalow was to be conveyed to them, while the defendant contends that they were only to have the use of the bungalow during the life of his mother. In other words, since the parties concede that there was some kind of an agreement the ultimate facts are that there was an agreement and that its terms were either as claimed by the plaintiffs or as asserted by the defendant. Careful readings of the entire record have convinced us that the terms of the agreement were as alleged by the plaintiffs and that they have established their contention by evidence which in kind and quality fully meets the justly rigorous requirements of the law. No good purpose could possibly be served by giving a detailed statement and analysis of all the evidence and we shall therefore content ourselves with a mere outline of some of the outstanding circumstances which unequivocally point and lead to the ultimate fact as found by us.

There was a persuasive reason for Mrs. Butrick to make the agreement and that reason is found in the circumstance that she wanted to live with somebody. She was 69 years of age; and although there is not a word of evidence to indicate that she was mentally weak yet it does appear that because of certain physical disabilities, producing repellent rather than attract-

ive conditions, she sometimes needed to be assisted and cared for by another. She had attempted to live with her son and his wife but at the end of two or three months she left because unable to "get along" with the wife. Her attitude toward the defendant and his wife is reflected in a conversation she had with one witness while at the Park Street boarding-house and in a talk she had with another person at the bungalow.

Mrs. Katherine White was one of the roomers at the Park Street house and she said that while there Mrs. Butrick "talked of her son and her son's wife" and that "she would like to live with them, but that they didn't make it happy for her."

Another witness, Edward Cashmore, testified that while engaged in doing some painting in the bungalow Mrs. Butrick told him that

"she had given her son Edward, I think she called him, considerable money, and she could not, or did not want to live with any of her folks, and she was staying with the Schlussels."

It is true that the plaintiffs had been engaged,—for how long is not shown by the record,—and that Josephine Leach refused to consummate the engagement until Mark Schlussel demonstrated to her that he could furnish her a home, and consequently it can be plausibly argued that the desire of Mark Schlussel to redeem his plighted troth and the refusal of Josephine Leach to enter into the bonds of matrimony until he furnished her a home supplies a motive for the claim that he overreached Mrs. Butrick. This argument advanced by the defendant has not been overlooked, but it has been given due consideration.

Mrs. Butrick did not go to her son for advice concerning her affairs, but she preferred to consult with others.

During the declining days of her life she attempted to live in the home of her son but she afterward sought and found elsewhere what she had sought and failed to find in the home of her son.

The Schlussels were placed in possession of the bungalow. The plaintiffs made permanent improvements upon the premises with the knowledge and consent of Mrs. Butrick.

The witness Cashmore worked around the bungalow for three or four weeks while plaintiffs and Mrs. Butrick were living there and he testified that "from conversations I overheard just as a man working around the house will, that the property was Schlussel's and she [Mrs. Butrick] was simply staying there"; and again, when speaking of conversations overheard by him he said that he understood from them that "I was to look to Mrs. Schlussel for the money for the work I was doing around the house."

The Schlussels paid $45 for enameling the kitchen, $30 for tinting, $27.50 for electric wiring and between $40 and $55 for shrubbery.

Mrs. Butrick made statements to disinterested persons, before moving into the bungalow, indicating a desire to have the plaintiffs agree to do exactly what the Schlussels now claim they did agree to do.

Charles Kirk testified that Mrs. Butrick said to him at the Park Street boarding-house that

"she would like to have Mr. and Mrs. Schlussel get married and that she wanted to buy a home on the East Side for them if they would keep her the remainder of her life."

Mrs. Katherine White appeared as a witness and said that Mrs. Butrick told her that

"if the plaintiffs would marry she would give them the bungalow, if they kept her for the rest of her life."

The plaintiffs testified, in substance, that Mrs. Butrick made the offer to buy a home and convey it to the plaintiffs if they would care for her during the remainder of her life; that the offer was communicated to Mark Schlussel and that he in turn informed Josephine Leach of it; that the offer was not accepted immediately, but after some deliberation the plaintiffs concluded to accept the offer.

Mrs. Butrick moved to the Park Street boarding-house and disposed of all the furniture that she had in the Lownsdale Street rooms except a bedstead, which was afterward taken to the bungalow. The Schlussels furnished the bungalow throughout with furnishings that had been used in the Park Street house and they sold the remainder of the Park Street house furnishings at a sacrifice. Mrs. Butrick was permitted to choose her own room in the bungalow and that room was supplied with furnishings selected by her from the Park Street furnishings.

The plaintiffs were married in the County Courthouse and from there they went to the Hazelwood restaurant where a wedding feast was spread. While at the wedding feast Mrs. Butrick made statements which corroborate the version given by the plaintiffs; and those statements were not only unequivocal but were made under circumstances naturally calling for truthful expression and were made to persons whose testimony is entitled to full belief.

W. N. Gatens, a circuit judge, who performed the wedding ceremony, was present at the wedding feast and when asked to "tell us anything you recollect," testified as follows:

"Well, I cannot recall any exact words. We just talked about Mr. and Mrs. Schlussel, and about—it seemed Mrs. Schlussel before her marriage, as I recollect it, maintained a rooming-house and boarding-

house and Mr. Schlussel had lived with her and boarded with her in one of Mrs. Porter's houses, and I knew the property up there, knew Mrs. Porter, and that attracted the conversation. And the impression I got—I would not attempt to use the language, because we were just there at a wedding feast—but the impression I got was Mrs. Butrick, that they were to give Mrs. Butrick a home during her lifetime"; and in response to the next question, "that would be the substance?" the witness continued thus: "that would be the substance of it and that when she died the home would be theirs. That was about the substance."

W. P. La Roche, city attorney of Portland, also attended the wedding feast and when asked to "state the substance of the conversation concerning the relationship that was to be and what it was expected from one party to the other," testified as follows:

"The understanding I have had in my mind all the time was that Mrs. Butrick was to make her home with Mr. and Mrs. Schlussel and she was to give them a bungalow that had been purchased at Rose City Park. Afterward I visited them in the bungalow in question, and the matter was again referred to between Mr. and Mrs. Schlussel and Mrs. Butrick while I was there, and the same understanding was had."

From time to time after she moved into the bungalow up to the date of her death Mrs. Butrick made statements, to different persons whose testimony is entitled to belief, which support the contentions of the plaintiffs.

Michael Ruvensky visited the Schlussels at the bungalow and heard Mrs. Butrick say "she would be taken care of well, and that she had given the property to Mr. and Mrs. Schlussel if they would take care of her until her death." The testimony of this witness is corroborated by his sister Clara Ruvensky, who was present and heard the conversation.

George Ribbecke attended a card party at the bungalow and on that occasion heard Mrs. Butrick say "this is my home as long as I live, but I made Joey a present of this home."

Charles Kirk visited at the bungalow after the Schlussels were married and was told by Mrs. Butrick that

"she was very much pleased with her home out there, and that it belonged to Mrs. Schlussel, that she gave it to her as a wedding present with the understanding that she was to live there the rest of her life and they were to take care of her."

Frank L. Waller says that on one occasion when he was visiting at the bungalow Mrs. Butrick

"told me she had given the place to Joe, as she termed Mrs. Schlussel, and she was going to live with her; that she had given the place to them."

L. M. Sullivan, who stayed at the bungalow for about 10 days in June, 1915, testified that Mrs. Butrick "told me she had made a present of it [bungalow] to Josie and Mark."

Mr. La Roche paid two visits to the Schlussels after their marriage; the first visit was "inside of a month following"; and "the next time was perhaps about six or eight months"; and he testified that

"the last visit I paid to the Schlussels Mrs. Butrick said that she was not feeling well at that time, had been indisposed, and just as soon as she felt better she wanted me to prepare some instruments and necessary papers to give the bungalow to Mrs. Schlussel."

Some of the statements attributed to Mrs. Butrick were made in the presence of both or one of the Schlussels, while others were made in their absence.

The bungalow does not embrace all the property owned by Mrs. Butrick at the time of her death. She

owned a three-story brick building, two farms and other property which with the bungalow were inventoried by the appraisers of her estate at $17,000, but Mark Schlussel claims that the "approximate value of the whole estate outside of this bungalow" at the "least figure would be $75,000."

It is true that there was evidence in behalf of the defendant. Besides the defendant himself, four witnesses, two of whom were manifestly biased against the Schlussels, gave testimony in support of the position taken by Hays. However, the evidence for the plaintiffs, as we read the record, establishes the claim made by them with the degree of certainty required by the law; and moreover as stated by Mr. Justice McCAMANT in *Tucker* v. *Kirkpatrick,* 86 Or. 677, 679 (169 Pac. 117),

"the lower court saw the witnesses and heard their testimony; his opportunities for determining the issue of fact arising on this conflicting testimony were better than ours and great respect is due to his findings."

As a part of the decree the trial court ordered the defendant to pay the installments as they matured and "if he refuse to do so, that the plaintiffs herein have and recover judgment of and from the said Edward Hays, defendant, for the sum of eighteen hundred ($1800) dollars with interest thereon, the amount of the installments remaining due and unpaid."

The defendant was appointed administrator of his mother's estate. The record does not show when the appointment was made but it probably occurred soon after July 20, 1915. There is no evidence to show whether the estate has been closed and the administrator discharged; but in view of the fact that this suit was begun on February 11, 1916, it may be assumed that the estate had not yet been closed when this suit was commenced. Edward Hays is the sole defendant.

The plaintiffs do not allege that the administration of the estate has been completed, nor do they aver that the personal assets of the deceased were insufficient to pay the claim of the plaintiffs nor is it shown that any attempt was made to collect from the administrator.

It is provided in Section 491, L. O. L., that heirs are liable to a suit by a creditor of a deceased person to recover the debt of their ancestor to the extent of the value of any real property inherited by them. The money judgment entered against the heir, Hays, proceeds upon the theory that the amount of the judgment represents the debt of the ancestor, Mrs. Butrick. The word "debt" is defined by Section 494, L. O. L., to

"include all claims for the payment of money, whether liquidated or otherwise, which survive against the personal representative of the deceased, as provided in Section 484, L. O. L."

But Section 492, L. O. L., declares that the heir is not liable for the debt

"unless it appear that the personal assets of the deceased were insufficient to discharge it, or that after due proceedings the creditor has been unable to collect the debt from the personal representatives of the deceased, or from his next of kin or legatees. If the personal assets were sufficient to pay a part of the debt, or in case a part thereof shall have been collected, the heirs of such deceased person are liable for the residue."

6. The personal property is in the hands of Edward Hays as administrator. The real property descended to him contemporaneously with the death of his mother, but of course subject to her debts. The debt of Mrs. Butrick is not, strictly speaking, a debt of Edward Hays although he may become liable for the amount of that debt to the extent of real property inherited by him. The contingent liability mentioned in Sec-

tion 491 does not assume the form of a real liability until the creditor shows what Section 492, L. O. L., says must appear. For aught that appears in the record there may be sufficient personal assets to pay the amount, or it may be that a claim presented to the administrator would be paid. Manifestly, the plaintiffs have not brought themselves within Section 492, L. O. L., and consequently they are not entitled to a money judgment. Mrs. Butrick agreed to convey the bungalow free of encumbrances to the Schlussels, but the most that the plaintiffs are entitled to in this suit is a decree for the interest owned by Mrs. Butrick at the time of her death. The decree will therefore be modified, but without prejudice to any rights that the plaintiffs may have on account of the unpaid installments. The plaintiffs will be allowed judgment for costs and disbursements. MODIFIED.

BEAN, BURNETT and JOHNS, JJ., concur.

Argued July 24, reversed September 10, 1918.

MOSIER *v.* MOSIER.

(174 Pac. 732.)

Divorce—Sufficiency of Evidence—Cruelty.

1. In husband's action for divorce, where both parties charged the other with cruelty, evidence *held* to show husband and wife equally at fault and subject to like criticism.

[As to cruelty as ground for divorce, see notes in 29 **Am. Dec.** 674; 73 **Am. Dec.** 619; 40 **Am. Rep.** 463; 51 **Am. Rep.** 736; 65 **Am. St. Rep.** 69.]

Divorce—Parties Equally at Fault—Right to Divorce.

2. In divorce action, where evidence showed both parties equally at fault, neither was entitled to divorce.

[As to recriminatory defenses in divorce suits, see notes in 15 **Am. Dec.** 211; 86 **Am. St. Rep.** 333.]

From Wasco: WILLIAM L. BRADSHAW, Judge.

Department 2.

This is a suit for divorce. The amended complaint alleges that the plaintiff and the defendant were intermarried at The Dalles, Oregon, in February, 1889; that there has been no issue of their marriage and:

"That about ten years ago the defendant complained that her rights in the property of the plaintiff were not properly protected, and demanded that the plaintiff deed to the defendant one half of all his property, the defendant claiming that by so doing she would become the owner of all the property at the plaintiff's death, which she claimed and demanded as her right, and that the (adopted) daughter of the plaintiff and defendant has no right to any portion of the plaintiff's property, either in his lifetime or at his death.

"That the defendant became very insistent upon her demands for the plaintiff's property, and in a violent and threatening manner asserted to the plaintiff that he never could get a divorce from her, but she could get a divorce from him, and that she would leave him and get a divorce from him unless he conveyed his property to her, and at other times she would threaten not to leave him, but to stay with him for the purpose of harassing, vexing, annoying and persecuting him, and stating that she would make life a burden to him, and that she would break him up in business and bring him to want, and at other times she would threaten to commit suicide if her demands were not granted by the plaintiff, and the defendant promised that if the plaintiff would convey his property to her that she would live with him and be entirely contented and would treat the plaintiff right and endeavor to make him happy.

"That by the threats of the defendant, who is a violent woman, and being intimidated by her threats and relying upon her promises of better treatment in case her demands should be granted, the plaintiff for these reasons and not otherwise yielded to the demands of the defendant and conveyed to her Block 9 in the town of Mosier, comprising about four acres, and

which would constitute about thirty-two town lots if subdivided, and which is of the value of ——."

For such reasons the plaintiff thereafter caused to be conveyed to the defendant an undivided one-half interest in ninety-three acres of land in Wasco County, for which it is alleged that he paid the entire consideration.

The amended complaint then alleges that the defendant was not satisfied, but ever since

"has persistently and continuously demanded that the plaintiff deed to her an undivided one-half interest in all of his property of every kind, and frequently when the plaintiff would not grant her requests and demands the defendant has cursed and abused the plaintiff and called him vile, profane and opprobrious names, and has threatened to commit suicide if plaintiff did not grant her requests and demands and convey to her an undivided one half in and to all of the plaintiff's property."

It is alleged that such demands and threats were frequent, that defendant would not live with plaintiff unless he granted them, and:

"In the last ten years the defendant has lived separate and apart from the plaintiff by far the greater portion of the time, and has lived in Portland, Oregon, and at the beaches and in the State of California and has only come to the plaintiff's home and lived with him at such times as were convenient for the defendant, and at such times that she wished to press her demands above mentioned, and to torment, harass, vex and annoy the plaintiff in the manner hereinbefore mentioned. * *

"That the defendant has without cause or provocation on the part of the plaintiff repeatedly and at different times which the plaintiff cannot now mention, called the plaintiff vile and opprobrious names and threatened to do him bodily harm and threatened to kill him, and has struck the plaintiff, all without cause

and for the purpose of injuring, vexing, harassing and annoying the plaintiff."

It is also alleged that:

"The plaintiff has been intimidated by the defendant until he is afraid to remain or live with the defendant, or be in her presence for fear of physical injury at her hands, and he has been rendered sick and nervous and has been harassed, humiliated, vexed and annoyed beyond description and measure, and said acts and threats and conduct on the part of the defendant constitute cruel and inhuman treatment of the plaintiff by the defendant and personal indignities toward him, all of which render the plaintiff's life with the defendant unbearable and burdensome."

The foregoing is the substance of the complaint, to which the defendant filed an answer in which she denied any and all of the material allegations and pleaded an affirmative defense, setting out a list of real and personal property owned by the plaintiff and its probable and rental value. She alleges that for a long time she had been and now is in ill health and unable to perform any work or labor; that all of the property was acquired by the joint efforts and industry of the plaintiff and herself; that at the time of their marriage the plaintiff was twenty years of age and she was an inexperienced child of fourteen years; she charges plaintiff with cruel and inhuman treatment and failure and neglect to provide for her properly, and specifies other grounds which are unnecessary to this opinion. The lower court rendered a decree for the plaintiff, from which the defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Mr. Jay Bowerman, Mr. J. M. Long* and *Mr. Fred W. Wilson,* with an oral argument by *Mr. Bowerman.*

For respondent there was a brief and an oral argument by *Mr. William H. Wilson.*

JOHNS, J.—We have carefully read all of the testimony and examined all of the exhibits, including the broken false teeth, torn shirtwaist and the photographs of the defendant. It is true, as counsel says, that there is a large amount of perjured testimony in the record; it is also true that under the allegations of the complaint a very large amount of the testimony is wholly immaterial. Yet there are many undisputed material facts in the record.

At the time of their marriage the plaintiff and the defendant did not have any home or property rights and were wholly dependent upon their own personal efforts and labor, and the testimony is undisputed that for the first twenty years of their married life they lived happily together, were devoted to each other and were saving, economical, thrifty and industrious, as a result of which they perfected and acquired title to a homestead which they cleared and developed and upon which they made valuable improvements. Defendant claims and the testimony shows that during all of that period, in addition to her housework she labored in the fields and assisted in the clearing of the land and the planting of the orchards and performed at least her share of the work in acquiring and improving the homestead, which they later sold for $8,000. With that money as a basis, the plaintiff continued to prosper, became a prominent business man and constructed a beautiful modern residence in the town of Mosier, where they made their home and were living at the time of their domestic troubles.

While living in their new home, the defendant claims that she became rheumatic and that for such reason

it was necessary for her to have a climatic change, and she made different trips to the City of Portland and two trips to the State of California, during most of which time the plaintiff remained at home, looking after his business interests. For want of children, the plaintiff and the defendant undertook to adopt, and thought that they had legally adopted an infant girl, who was reared and educated by them and who at the time of their troubles was about twenty years of age. While not away at school, the girl, Alice, remained at home with the plaintiff during the different times the defendant was in Portland or California.

1, 2. A large amount of evidence was introduced as to the actions and conduct of the defendant while she was away on her trips. All of such trips were made with the apparent consent and approval of the plaintiff, and while the defendant's conduct was not above reproach and is subject to censure, we do not know upon what theory or legal principle her alleged actions while she was away from home would be any evidence of cruel and inhuman treatment of the plaintiff. It appears from the record that during the time the defendant was on her last trips a certain school-teacher lived and resided at the home of the plaintiff with his daughter Alice. Alice testifies that after she returned home the defendant wanted the school-teacher to leave, and while the plaintiff and the defendant may theretofore have had some minor trouble and had ceased to love and respect each other as in their days of youth and poverty, it was then and there that serious trouble first arose between them. They then became suspicious and lost confidence in each other and the defendant then felt that in a large measure the school-teacher had assumed her own place at the family table and fireside; Alice also testifies, and on that particu-

lar point her testimony is uncontroverted, that she was awakened at 2:30 A. M. and arose, going downstairs, where she found the plaintiff and the schoolteacher alone in the kitchen without a light. The testimony is also undisputed that the plaintiff, under an assumed name, received letters through the postoffice at Hood River. Further, the testimony is undisputed that the plaintiff committed an assault upon the defendant in a public place, in the presence of divers individuals, and forcibly and violently removed her shoe from her foot. While it may be true that there is perjured testimony, that the defendant is at fault and her conduct is subject to criticism, we are of the opinion that the plaintiff is not without blame and that he is equally at fault and subject to like criticism. For such reason, under the facts disclosed in the record neither of them is entitled to or should have a divorce. The decree is reversed and neither party shall recover costs in either court. REVERSED.

McBRIDE, C. J., and BEAN and BURNETT, JJ., concur.

Argued June 25, reversed and remanded September 10, 1918.

BRUNDAGE *v.* SOUTHERN PAC. CO.

(174 Pac. 1139.)

Master and Servant—Death of Railroad Employee—Evidence Admissible Under Pleadings—Rules and Regulations.

1. In action against railroad for death of employee in tunnel collision, evidence of failure to promulgate and enforce rules, tending to show negligence, is admissible under allegations of negligence in operation of train and in failure to have a light on lead car of train or in tunnel.

Master and Servant—Railroads—Failure to Light Tunnel.

2. Railroad's failure to have a light in a tunnel 625 feet long and constructed on a seven-degree curve was not negligence, where its

rules required employees operating motor-cars to exercise great caution and use stop signal where view of approaching train was obscured.

Master and Servant—Railroads—Employee's Death—Tunnel Lights.

3. In action against railroad for death of employee in tunnel collision between employee's speeder and construction train, railroad's failure to have a light in the tunnel, which was 625 feet long and constructed on a seven-degree curve, where its rules required employees operating speeders to exercise caution and use stop signals, was improperly submitted to jury.

[As to disobedience of rules or regulations of master as affecting right of servant to recover for personal injuries, see note in **Ann. Cas.** 1912A, 84.]

Master and Servant—Death of Railroad Employee—Assumption of Risk—Unlighted Tunnel.

4. Where railroad telegraph inspector, having for more than 30 days used speeder, and knowing that a tunnel was without lights, and that construction trains backed through such tunnel without lights, was killed while in tunnel through collision with construction train, railroad is not liable; inspector having assumed risk.

Trial—Instructions—Evidence—Violation of Rules.

5. In action for death of employee caused by collision in tunnel while employee was riding a speeder, where defendant interposed defense of contributory negligence and a rule requiring employees using speeders to use stop signals or walk when view of track is obscured was introduced in evidence, an instruction, restricting jury's consideration of evidence of violation of such rule to the rate of speed employee was traveling, *held* improper.

From Lane: GEORGE F. SKIPWORTH, Judge.

This action is brought under the Federal Employers' Liability Act by the plaintiff, as administrator of the estate of William J. Framhein, deceased, against the defendant, to recover damages for his death while in its employ. Framhein was a telegraph inspector and lineman and it was his duty to keep the telegraph lines of the defendant in repair along its railroad tracks between Reedsport and Eugene in this state. As a part of his equipment he was furnished with a speeder on which he traveled by rail from place to place in the discharge of his duties. On the line of railway between the above-named points there were certain tunnels, one of which was known as Tunnel Number Four, about 625 feet in length and constructed

on a seven-degree curve. There were no lights in the tunnel and it was dark near the center.

The deceased was first employed by the defendant as a lineman in July, 1910, and while at the time of his death he had been in the employ of the defendant at that particular place for only about thirty days, it appears from the record that at previous times and in other places he had been in the defendant's employ for nearly three years and was an experienced lineman.

On June 26, 1916, about 10:30 A. M., while in the employ of the defendant as a lineman and riding on his speeder in the discharge of his duties, Framhein entered Tunnel Number Four and at about the center thereof was struck by and collided with the lead or front car of a construction train of the defendant which was moving backward, and was almost instantly killed. The train consisted of a coal-car, a water-car and two tenders driven from behind by a steam locomotive. There were no lights in the tunnel and none on the construction train. There is no testimony tending to show that the deceased saw the train or that anyone on the train saw him in time to avoid the accident.

The complaint alleges that the construction train was negligently operated, without due care and without providing or giving any warning to the deceased traveling on his speeder, by the pushing of the train with the said engine backward, through the tunnel, by negligently failing to have any light on the lead car or east end of the train, or to have any lights whatever in the tunnel, and without the fault or negligence of the deceased; that while he was traveling through the tunnel on his speeder in the discharge of his duties, the train collided with Framhein and that such failure and

neglect on the part of the defendant was the proximate cause of his death.

The facts alleged and the proof of such facts bring the case under the terms and provisions of the Federal Employers' Liability Act. It is alleged that Framhein was a strong, healthy man, twenty-five years of age, and that he left a widow and a minor child three years of age, who were dependent upon him for support.

The defense was assumption of risk and contributory negligence. After general denials, for a further and separate answer the defendant alleged that the deceased was experienced in his employment; that he knew, understood and appreciated the risk and dangers incident to the use of the speeder upon and along the railroad tracks over which the trains were operated; that it was his duty before entering the tunnel to ascertain the location of any and all trains operating over the railroad in his vicinity and to stop his speeder and listen for any trains that might be in or approaching the tunnel; that it was his duty not to enter the tunnel until he knew that there was no train in or near it and to see that everything was clear through the tunnel before going in with his speeder; and that he knew that trains, engines and cars at any and all times were likely to enter the tunnel and that engines and construction trains were operated backward through the tunnel without any lights thereon and without any lights in the tunnel.

The rules of the company provided that:

"Hand-cars, motor-cars, etc., must be run with great caution at all times and particularly at night and in fogs"; and that: "When the view of approaching trains is so obscured by any cause that there would not be ample time to remove car to avoid being struck by a moving train, stop signals should be used."

There was no rule of the company providing for lights in any of its tunnels, either by day or night, and there was no rule which required lights on any trains or the engines thereof between sunrise and sunset. The testimony is undisputed that the construction train had the right of way over the speeder and over all other trains except passenger trains. There is testimony tending to show that the deceased had knowledge of the rules and regulations by which the defendant managed its trains and by which he was to operate his speeder.

The defendant made motions for a nonsuit and for a directed verdict, both of which were overruled. The jury returned a verdict in favor of the plaintiff for $10,000, $5,000 of which was awarded to the widow and $5,000 to the minor child. Judgment was entered upon the verdict, from which the defendant appeals, making thirty-two assignments of error, among which is the overruling of the motions for a nonsuit and for a directed verdict. REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Roscoe C. Nelson, Mr. Ben C. Dey, Messrs. Smith & Bryson* and *Mr. Coy Burnett,* with an oral argument by *Mr. Nelson.*

For respondent there was a brief over the names of *Mr. Charles A. Hardy* and *Messrs. Devers & Medley,* with oral arguments by *Mr. Hardy* and *Mr. J. S. Medley.*

JOHNS, J.—1. While there are no specific allegations made in the complaint of the failure and neglect to promulgate and enforce rules and regulations, yet under the authority of *Wild* v. *Oregon Short Line Co.,* 21 Or. 159 (27 Pac. 954), the allegations made are broad

enough to permit proof of any such failure and neglect as tending to show negligence. It appears from the record that the plaintiff did not offer any testimony whatever as to any rules or regulations of any kind or for any purpose, or as to the failure of the defendant to adopt any rules and regulations for the conduct of its business, or as to any established usage or custom.

The record shows that the defendant did offer in evidence a printed book or copy of its rules and regulations for the operation of its trains and the government and control of its employees and that such rules and regulations were known as "Standard Rules" and became effective April 1, 1909. It also appears from the application to the defendant for employment, by the deceased, the body of which is in his own handwriting, that he was first employed by the defendant as a lineman on other of its properties in July, 1910, and worked until November, 1911; that he was again so employed in January, 1913, and worked until April, 1914, and again from February, 1916, to April, 1916; that at the time of making his application for his last employment, where he met his death, he signed the following statement:

"I hereby acknowledge receipt of a copy of the rules and regulations for the government of employees of the operating department of this company, and all amendments thereto, and also a copy of the current time table, and agree to familiarize myself with and observe all the same, and to keep advised of such amendments to said rules as may be hereafter made, and have had explained to me the dangerous nature of the service in which I am about to engage."

It also appears from the evidence that on April 21, 1916, the defendant mailed to him from its San Fran-

cisco office a letter advising him of the shipment of the speeder, in which he was thus instructed:

"Also in rounding curves or obscure points have your car under complete control at all times and do not proceed without properly protecting yourself or flagging. Every precaution is to be taken so that the car will not be damaged and yourself injured."

There is no testimony which shows or tends to show that in the operation of any railroad there was any established rule, custom or regulation requiring any kind of a tunnel to be lighted either by day or night. Neither is there any specific evidence which shows or tends to show that between sunrise and sunset there should be a light of any kind anywhere on a construction train passing through a tunnel.

The court instructed the jury that among other grounds of negligence the complaint alleged the following:

"That the said defendant corporation * * negligently failed to have any light upon said train and negligently failed to have any light upon the east end of said train and negligently failed to have any lights in said tunnel of any kind whatever, and which tunnel was about 624 feet long and is built on a curve so that it is dark at all times within said tunnel; and that the said defendant corporation, as aforesaid, so negligently operated said unlighted train through said dark tunnel and without any warning,"

and that the plaintiff claimed that the defendant was negligent in four respects, the last of which is as follows:

"That the defendant negligently failed to have any lights upon the east end of the train and failed to have any lights in the tunnel,"

and then gave the following instruction:

"I instruct you that before the plaintiff would be entitled to recover in this case, he must prove by a preponderance of the evidence that the defendant was negligent in the particulars or some of the particulars alleged in the complaint, and that such negligence, if there was negligence, was the proximate cause of the death of William J. Framhein."

In a number of its instructions the court, in legal effect, told the jury that it could find against the defendant upon any one of the grounds of negligence charged in the complaint. The failure "to have any lights upon the east end of the train" and the failure "to have any lights in the tunnel" were particular grounds of negligence specified in the complaint and by such instructions each of said grounds was submitted to the jury, and under such instructions the jury could have returned its verdict on both or either of them. This squarely presents the questions as to whether the failure and neglect of the defendant to maintain lights in its tunnels is in itself evidence of negligence sufficient to sustain the verdict, and whether the failure and neglect of the defendant to maintain lights upon a construction train going through a tunnel, between sunrise and sunset, is in itself sufficient evidence of neglect to sustain the verdict.

The record shows that the defendant had adopted and had in use since April 1, 1909, certain rules and regulations for the operation of its trains and the control of its employees, known as "Standard Rules," and that the deceased was an experienced lineman and as such had been in the employ of the defendant at different times and places for about three years, and there is strong testimony tending to show that he had knowledge of the existence of such rules. It is provided in Rule 772 of the defendant that:

"All cars must display a white light at both front and rear when operated between sunset and sunrise."

But there is no rule which requires that a light shall be displayed upon an operated car between sunrise and sunset.

In 3 Labatt's Master and Servant (2 ed.), page 2948, the author says:

"The presumption of law is in favor of the sufficiency of the rules adopted by a master for the government of his servants and business, as bearing upon the question of negligence of the master rendering him liable for injury to a servant. Unless those rules are shown to be 'palpably unreasonable or clearly insufficient,' the master ought not to be charged with negligence on account of their adoption and use,"

and on page 2951 of the same volume it is said:

"But in the absence of evidence showing that rules would be useful and feasible under the circumstances, the master cannot be found negligent in not having promulgated them. It is, therefore, error to leave the case to the jury where the plaintiff has offered no evidence which indicates that other employers in the same business had promulgated any such rule, or that the suggested rule was necessary or practicable, or that the necessity and propriety of making such a rule was so obvious as to make the question one of common knowledge and experience. Especially is it unwarrantable to infer culpability in the absence of such evidence, where it appears that the rules actually promulgated by the defendant supplied an adequate protection against the occurrence of accidents like the one in question, so far as they could be prevented by rules."

In *Corcoran* v. *Delaware, L. & W. R. Co.,* 126 N. Y. 673 (27 N. E. 1022), the court said:

"We think that there was no proof of neglect on the part of the defendant to make and promulgate suitable and proper rules for the information and government

of its employees, to warrant the submission of the case to the jury."

In 26 Cyc., page 1159, it is said:

"While the adoption or nonadoption of rules by others in the same line of business is not conclusive as to the duty of the master in this respect, yet as a rule his adoption of such regulations as are in general use will relieve him from liability; and where there is no evidence that any rules relating to the business had been adopted by others, or were necessary or practicable, he is not chargeable with negligence in failing to adopt any."

In 18 R. C. L., page 574, we find:

"But, ordinarily, the usage of employers generally is the standard by which the necessity for a rule is to be determined. The fact that no rule covering the circumstances out of which the injury arose has been promulgated by other employers in the same kind of business points very strongly to the conclusion that the failure to promulgate such a rule is not actionable negligence."

In *Grant* v. *Union Pacific Ry. Co.*, 45 Fed. 673, in which SHIRAS, J., orally charged the jury, the syllabus lays down this rule:

"It is not negligence on the part of a railroad company to have switches without lights on them in its yard, unless it appears that it was the common and uniform practice to have such lights, and that the switchmen had a right to expect them."

In *Ferrari* v. *Beaver Hill Coal Co.*, 54 Or. 210 (94 Pac. 181, 95 Pac. 498, 102 Pac. 175, 1016), subdivision 19 of the syllabus is as follows:

"The question whether the master was at fault in failing to adopt suitable rules is not for the jury, unless there is something in the testimony from which the inference may be drawn that it was practicable to have

provided against the occurrence of the accident complained of by such a rule."

In *Wagner* v. *Portland*, 40 Or. 389–404 (60 Pac. 985; 67 Pac. 300), this court holds:

"The servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions. * * The question whether the defendant was at fault in omitting to adopt suitable rules is not one for the jury, unless there is something in the testimony from which the inference may be drawn that it was practicable to have provided against the occurrence of the accident complained of by such a rule. * * If, notwithstanding they were in fact necessary and practicable, it was a matter susceptible of proof, by showing that other municipalities, companies, or persons engaged in handling electrical machinery and appliances for generating and utilizing electrical currents had adopted and put into operation such rules, with serviceable results, or by the testimony of persons possessing peculiar skill and experience in the construction, repair, management and operation of such machinery and appliances. No such proof is to be found in the record, and hence a case has not been made in this particular upon which to put the question of negligence of the defendant in omitting the adoption and promulgation of the rules insisted upon to the jury."

In *Blust* v. *Pacific States Telephone Co.*, 48 Or. 34, 37 (84 Pac. 847), this court says:

"The evidence shows that he was an experienced lineman. He had worked at that business for several years, and was accustomed to putting up cables of the

kind which he was at work on when injured. He was familiar, not only with that character of work in general, but with defendant's method of doing it in particular. * * The case is ruled by the established principle that a servant entering or continuing in the employment of a master, with knowledge of the defective appliances used by him or the imperfect method of his work, without objection or complaint, assumes the added risk caused thereby, and cannot recover for an injury resulting from the use of such defective or insufficient method. * *

"A servant who voluntarily enters the employment of another, with knowledge of the defective appliances or methods used by that other, cannot be heard to say that he did not appreciate or realize the danger where the defect was obvious and the danger would have been known and appreciated by an ordinarily prudent person of his intelligence and experience."

In *Chadwick* v. *Oregon-Wash. R. & N. Co.*, 74 Or. 19, 30 (144 Pac. 1165), this court, through Mr. Justice BURNETT, lays down this rule:

"It is requisite that the defendant should make suitable rules for the movement of its rolling stock. This obligation is due not only to its employees but also to the general public who patronize it in its capacity as a common carrier. Reasonable regulations thus devised become the standard by which care or negligence is determined. Custom may be used as the means of interpretation, but cannot be admitted to contradict explicit rules and positive orders. This is on the principle that as the admitted rules known to the plaintiff govern the relation between him and his employer, they are in a sense part of the contract of his employment."

The complaint alleges that:

"Said William J. Framhein was required to ride through said tunnel on the said motor car"; and that: "He was required to travel on said motor car on said line of railway"; that: "He was required to ride

through what is known as Tunnel Number Four on said line of railway"; and that he: "Was proceeding through said tunnel on said motor car in accordance with his said duties."

The answer alleges that:

"The said William J. Framhein suffered the injuries from which he met his death as a result of causing a motor car or speeder, then being operated by mechanical power, on which he was riding, to come into collision with a locomotive in Tunnel Number Four."

" * * And in connection with the said employment was required to ride on a motor car operated by mechanical power, over the line of railroad of the Willamette Pacific Company in Lane County, Oregon."

Under such allegations the question is settled that the deceased was riding on his speeder at the time of the collision. Rule 772 of the company provides that motor cars

"must be run with great caution at all times and particularly at night and in fogs" and that "when the view of approaching trains is so obscured by any cause that there would not be ample time to remove the car from the track before being struck by a train * * stop signals should be used in either or both directions. * * Employees operating inspection cars (motor cars or velocipedes) who have not enough assistance to flag in either or both directions when necessary as herein prescribed, must walk with their cars until the view for a safe distance is not obscured in either direction."

The letter of instruction of April 21, 1916, required the deceased in rounding curves or obscure points to have his car under complete control and not to proceed "without properly protecting" himself or flagging; and there is ample testimony tending to show that the deceased had knowledge of such rules.

2, 3. How and upon what theory can the defendant be liable for negligence to have and maintain lights in

its tunnels, when it is a matter of common knowledge that no lights are kept or maintained in any railroad tunnel anywhere in the state, either by day or night? We are of the opinion that under the facts disclosed by the record the failure to maintain lights in the tunnel was not an act of negligence and ought not to have been submitted to the jury. There is not any evidence as to whether there should have been a light on the front or lead car of a construction train, which had the right of way, going backward through such a tunnel between sunrise and sunset, or that modern and approved methods of railroading require or do not require such a light; neither counsel has cited any authority on that point, and for such reasons we are not inclined to pass upon that question at this time.

4. On the question of assumption of risk the case of *Wagner* v. *Portland, supra,* is authority that if the deceased knew that there were no lights in the tunnel and that construction trains were operated through the tunnel without lights, between sunrise and sunset, and, having such knowledge, consented to accept, and continued in, his employment, his assent would dispense with the duty of the defendant to provide such lights. The deceased was in the employ of the defendant and using the speeder on its tracks for more than thirty days prior to his death and there is evidence from which the jury could have found that he knew there were no lights in the tunnel. If he did have knowledge of the want of such lights in the tunnel and the operation of construction trains backward through the tunnel without such lights, he assumed the risk, and the absence of such lights, if a defect, would be one of which he would have no right to complain.

5. The court gave the following instruction:

"However, the only evidence in this case which you can consider as a violation of Rule 772 is the evidence with reference to the rate of speed which Framhein was traveling at the time of the accident."

That instruction was clearly wrong. Under it the jury would have no right to consider whether the deceased had complied with, or violated, any of the terms or provisions of Rule 772 or the letter of instruction of April 21, 1916, for the operation of his speeder.

The judgment of the Circuit Court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

McBRIDE, C. J., concurs.

HARRIS, J. (Concurring Specially).—While riding on a motor car or speeder William J. Framhein was killed by colliding with a train in tunnel No. 4 on the Willamette Pacific Railroad which extends from Marshfield to Eugene where physical connection is made with a main line of the Southern Pacific system. The Willamette Pacific Railroad was still in course of construction when the fatal accident occurred on June 26, 1916, and was still under the control of the defendant's construction department, although a mixed train ran according to a regularly issued time-table and a tri-weekly freight train was "run extra" on a schedule which was issued "merely as a guide and information for shippers and others who may inquire as to the proper time that these trains will reach certain stations" and without "any idea of controlling movement of the trains which will run extra." When proceeding from Marshfield to Eugene the mixed train was called No. 1 and when running from Eugene towards Marshfield it was known as train No. 2. The tri-weekly freight train was designated as train No. 251 when

proceeding towards Eugene and as No. 252 when running towards Marshfield.

It will be necessary to remember the names of a few of the stations and their relative locations. Noti is 18 miles from Eugene. Traveling towards Marshfield it is 10 miles from Noti to Walton, 40 miles from Walton to Cushman, about 5 miles from Cushman to Canary and nearly 4 miles from Canary to Lane. It is about 1,000 feet from the Eugene end of tunnel No. 4 to the switch at Canary. This tunnel is 624 feet in length and describes a seven degree curve from portal to portal. The curve does not immediately become a straight line at either end of the tunnel. Emerging from the Eugene end of the tunnel the track continues to describe a seven degree curve for about 20 feet from the portal and from that point it is reduced to four degrees "on back to a point about 400 feet toward Canary, and then it tapers from four to nothing, about 800 feet." Leaving the Marshfield end of the tunnel the seven degree curvature continues for a distance of about 300 feet. One witness testified that, standing at the whistling post "you can see back to the tunnel from there, and you can see about 100 feet the other way." The accident occurred about 10:25 A. M., and at or near the center of the tunnel.

One witness said that "it is quite dark in the center" of the tunnel and "you have to get out on the out end of the ties on the outside of the curve to see either way, from the center." Referring to the center of the tunnel, another witness testified that "it is not quite so dark as a very dark night. You can probably see your hand before you by putting it up pretty close to your face"; but "if the sun is right, you can see the rails all the way through as you walk through it." The fireman stated that "in the center of it, it is not quite

as dark as night, but it is dark in there." F. A. Feickert, a civil engineer, testified that

"there is always a reflection on the rail of the light from the portal. Standing at this end of the tunnel, you can't see any light clear into it. You get about halfway and you could see the light from the other end."

The work train left Canary on the morning of June 26th and proceeded two or three miles beyond Lane to a place where a steam shovel was at work. Cars were loaded with dirt and the work train returned to Lane where the dirt was dumped along the track. The work train kept the steam shovel supplied with water and it became necessary to go for water to Canary where the nearest water tank was located. The locomotive with its tender and a reserve tender behind it and a gondola coal-car and a water-car in front of it was uncoupled from the remainder of the train, and was started for Canary with an engineer, a fireman and two brakemen. The caboose and other cars which formed "the remainder of the train" were left at Lane in charge of the conductor who did some clerical work while the rest of the crew were making the trip to Canary. There was no accessible turntable and the locomotive was run backwards with the reserve tender forming the front of the train. The work train was obliged to protect itself against trains numbered one and two and trains numbered 251 and 252, but it had the right of way as against all other trains. Train No. 2 was not due at Canary until 10:56 A. M. and consequently at the time of the accident the work train was entitled to the right of way as against all trains. No report was made to the dispatcher, who was at Noti, before leaving Lane for train orders because no orders were

needed; and "there was no report of the movement of the train to anybody."

Clarence H. Gaffney, one of the brakemen, testified that when they left Lane he "caught the rear end of the tank"; and in this particular he is corroborated by the engineer, fireman, conductor and Martin Dillon, the foreman of construction. C. G. Landerking says that while standing near the track and two or three hundred feet from the entrance of the tunnel he saw "a brakeman standing about the middle of the" reserve tender, which was the first car to enter the tunnel. Otto Schulz, a boy ten years of age, says that he saw more than one man on the cars and he saw "they were standing all around on the cars, and sitting down," and that "most of the men that I saw was on top of the car." The engineer and fireman state that Gaffney remained on the end of the tender from the time they left Lane until the collision. Gaffney testified that when he caught the rear end of the train he then sat "on the buffer beam with one foot on the step and the other on the train line, the angle cock"; and that he "stayed there until Framhein hit us in the tunnel." No witness testified directly that there was no person on the end of the train at the place where Gaffney claims to have been. The only evidence tending to show that Gaffney was not on the end of the train consists of such inferences as may be drawn from the testimony of Landerking and Schulz.

The engineer says that the bell was ringing and Gaffney also states that he heard the bell ringing as the train approached the tunnel. The fireman explained that the bell was rung by an automatic-air ringer and that he turned on the valve which started the automatic ringer at a point about 200 yards from the en-

trance of the tunnel. No witness testified that the bell was not ringing.

There is a "whistle-post" for the tunnel about 62 paces from the portal. The engineer stated that the whistle was blown about one half a mile from the tunnel and also at a point about 100 yards from the entrance of the tunnel. The fireman testified that the whistle was blown "a quarter or a half the other side of the tunnel" and also at the whistle-post. Landerking said that "it whistled when it was off about 200 or 300 feet from the entrance to the tunnel." Otto Schulz says that he was with his uncle C. G. Landerking and heard the whistle before the train entered the tunnel. S. T. Evans was three or four hundred feet from the tunnel when he heard the whistle. Gaffney says that the whistle was blown just before the train entered the tunnel. There is no evidence that the whistle was not blown.

The speed of the train when entering the tunnel was estimated by the engineer at about eight miles per hour, by the fireman and Gaffney at eight or ten miles, and by S. T. Evans at five, six or seven miles per hour. C. G. Landerking said that the train was going "pretty nearly as fast as the passenger trains run on the same ground now." However, there is no evidence to indicate the speed of such passenger trains. The boy, Otto Schulz, said:

"I think it was going pretty fast. It was the first trains I ever saw much."

When speaking of the collision, Gaffney stated that "I seen the shadow of the speeder on the curve and heard the engine working"; and when asked how far the speeder was from him "at the time" he answered:

"I would judge fifteen or twenty feet, when I first seen it" and "it looked to me like he was making twenty or twenty-five miles an hour."

Gaffney says that when he first saw the shadow "I hollered to the engineer to plug her," which in railroad parlance means to apply the emergency brake.

Fred L. Kirby, the train dispatcher, was stationed at Noti. There was an agent and a telephone at Cushman and there was a telephone at Canary. Kirby explained that they "had two cases of wire trouble, one at Walton and one at tunnel 5"; that on the morning of June 26th Framhein, who was then at Walton, asked him "for a line-up"; that he gave Framhein

"the line up as far as Cushman. I told him I knew nothing of Mr. Dillon's work train and for him to be on the lookout for Mr. Dillon."

There is no evidence to show whether Framhein did or did not make any inquiries of the agent at Cushman.

Olaf Larsen testified that Framhein stopped his speeder where the witness was at work on the drawbridge "out of Cushman" and that Framhein told the witness "I am going down the line. I don't know, maybe I am going to Gardner," whereupon Larsen warned Framhein to "look out" for Dillon's work train. There is no evidence to indicate whether Framhein attempted to use the telephone at Canary.

Aside from the testimony of Gaffney, a conversation that Kirby once had with Framhein and a talk which Oliver A. Charlton, who was in charge of the signal construction work, had with Framhein, there is no evidence relating directly or indirectly to the speed at which Framhein was traveling when killed except the testimony of Fred B. Knoaper who says that Framhein was traveling at about six miles per hour when between "a quarter and half a mile" north of tunnel 3. The

length of tunnel No. 3 is 2,135 feet; and it is about a quarter of a mile from the south portal of tunnel 3 to the north portal of tunnel 4.

There were no lights in the tunnel and none on any part of the train. The engineer said that he could not see behind the tank and he admitted that he had testified at the coroner's inquest that from his position in the cab he could not see "very far on account of the darkness; right where the accident happened I could not see at all." The engineer testified that he "went to work there the first day of May"; and when asked "how many times in a day would you go through that tunnel?" he answered: "Well, always twice" and backwards "at least once."

Gaffney and Dillon both stated that the train was operated through the tunnel exactly the same as on previous days. However, Gaffney testified that if the train had been going forward instead of backward "he [the engineer] probably would have lighted the headlight." There is no evidence that lights were ever used when backing the train through tunnels and there is no evidence that Framhein had knowledge of the manner in which the work train was actually operated through tunnels.

The decedent was an experienced lineman and had worked for the defendant at different times, although the last period of employment began about six weeks prior to his death. During the four days immediately preceding his death, Framhein and his family lived at Cushman but during the prior portion of the six weeks of the last period of his employment he and his family lived at Reedsport, a station between Lane and Marshfield.

The company's business and Framhein's employment bring the action within the Federal Employers'

Liability Act. Contributory negligence can be pleaded for the purpose of reducing the amount of recoverable damages but it is not a complete defense as it was formerly. Assumption of risk as a defense is abolished only where the carrier has violated some statute enacted for the safety of employees; and, therefore, since the carrier is not charged with the violation of any statute adopted for the safety of employees, the defense of assumption of risk is available to the defendant: *Jacobs* v. *Southern Ry. Co.,* 241 U. S. 229 (60 L. Ed. 204, 36 Sup. Ct. Rep. 588); *Morata* v. *Oregon-Wash. R. & N. Co.,* 87 Or. 219, 225 (170 Pac. 291). The answer denies that the defendant was negligent and then pleads contributory negligence and assumption of risk.

The plaintiff is not entitled to recover unless the defendant was guilty of negligence. A complainant must now, as before the adoption of the Federal Employers' Liability Act, allege and prove that the carrier was negligent. The plaintiff alleges that the company was negligent in the following particulars: (1) the train was operated without any schedule; (2) the train was operated without any flagman on front of the same; (3) the defendant operated the train without "providing or giving any warning in any way whatever" to the decedent; (4) the defendant operated the train at a high rate of speed; (5) the defendant "failed to have any light upon said train and negligently failed to have any light upon the east end of said train"; and (6) the defendant "failed to have any lights in said tunnel of any kind whatever."

Actionable negligence involves three elements: (1) The existence of a duty; (2) failure to perform that duty; and (3) injury or death proximately resulting from such failure. If there is no duty there is no

negligence: 23 Am. & Eng. Ency. Law (2 ed.), 732; *Kansas City Southern Ry. Co.* v. *Langley* (Okl.), 160 Pac. 451. It becomes necessary, therefore, to ascertain what duty the defendant owed Framhein before we can determine whether a failure to do any of the things specified in the complaint would be actionable negligence.

The decedent was not a trespasser but he was an employee whose duties required him to travel along the track on the speeder which the defendant had furnished him to be used for that purpose. The law imposed upon the defendant the duty of exercising the degree of care which an ordinarily prudent man would have exercised under the same circumstances. The company was obliged to employ such precautions as the imaginary ordinarily careful man would have employed for the protection and safety of its employees. While no person on the work train knew that Framhein was in the tunnel yet in the language of the engineer; "I knew there was speeders on the road, or had been right along. * * I didn't know where they were. I knew there had been speeders along all the time." The railroad company is obliged to give reasonable warning of the approach of its train when, under all the circumstances, the presence of and danger to its employees is reasonably to be anticipated: *Louisville & N. R. R. Co.* v. *Bays' Admr.,* 142 Ky. 400, 402 (134 S. W. 450, 34 L. R. A. (N. S.) 678); *Southern Ry. Co.* v. *Sanders,* 145 Ky. 679 (141 S. W. 77); *Grow* v. *Oregon Short Line R. Co.,* 44 Utah, 160, (138 Pac. 398, Ann. Cas. 1914B, 481); *Oliver* v. *Roach,* 31 Ky. Law Rep. 284 (102 S. W. 274); *Wilhelm* v. *Missouri O. & G. Ry. Co.* (Okl.), 152 Pac. 1088; 2 Thompson on Negligence (2 ed.), 462.

Here was a work train which in the language of the conductor "was liable to be anywhere at any time"; it was run backwards into a tunnel built on a seven degree curve so that a person walking or riding between the rails could not, when at the center of the tunnel, see either way; and, moreover, it was dark near the center of the tunnel though "not quite so dark as a very dark night." The company furnished Framhein a speeder so that he could perform the duties assigned to him; and in the performance of those duties he also, to borrow the words of the conductor, "was liable to be anywhere at any time." The company not only gave him the right to use the track but it expected him to do so. It is true that he was bound to be on the lookout for trains and to yield the track to all trains and his use of the track was governed by rules promulgated by the company; but the duty prescribed for Framhein did not necessarily "relieve the employees in charge of the train from all obligation to be watchful on his account": *Brunell* v. *Southern Pacific Co.*, 34 Or. 256, 262 (56 Pac. 129). Indeed, the company itself recognized that the location and surroundings were such as to require a warning every time a train entered the tunnel, by planting a "whistle-post" 62 paces from the portal as a notice to the engineer to blow the whistle at that place before entering the tunnel. Assuming that it was the duty of the defendant to warn employees in the tunnel of the approach of the train it yet remains to be determined whether the defendant performed that duty.

One of the specifications of negligence contained in the complaint is an act of commission while the others are acts of omission. The plaintiff claims that the train was run too fast; that it was run without a schedule, without a flagman at the front of the train, without

blowing the whistle or ringing the bell, without a light on the end of the train and without a light in the tunnel.

The court properly instructed the jury that there was no evidence to sustain the charge of excessive speed. There is no evidence whatever to show that the whistle was not blown or that the bell was not rung. Every witness who testified about the whistle said that it was blown. No witness testified that the whistle was not blown. There was not even negative testimony from any witness that he did not hear a whistle. Indeed, C. G. Landerking, one of the witnesses for the plaintiff, stated that the whistle was blown when the train "was off about two hundred or three hundred feet from the entrance to the tunnel." Every person who testified concerning the bell said that it was rung. No witness stated that he did not hear the bell. If one or more witnesses in a position to have heard the whistle or the bell had testified that one was not blown and that the other was not rung or that he did not hear either the whistle or the bell then it would have been a question for the jury to determine what the fact was: *Smith* v. *Southern Pacific Co.*, 58 Or. 22, 33 (113 Pac. 41, Ann. Cas. 1913A, 434); *Morata* v. *Oregon-Wash. R. & N. Co.*, 87 Or. 219, 223 (170 Pac. 291); but all the evidence, including the plaintiff's evidence in chief, was to the effect that the whistle was blown at the whistle-post and all the testimony was likewise to the effect that the bell was rung. If it was the duty of the defendant to ring the bell and blow the whistle then the defendant performed that duty. There is affirmative evidence of a "whistle-post" for the tunnel and all the evidence upon the subject is to the effect that the whistle was blown at a place opposite or near the "whistle-post." If upon a retrial the evidence is the same as the record presented to us the court should

instruct the jury that there is no evidence to sustain the charge that the bell was not rung or to support the claim that the whistle was not sounded. Rule 31 promulgated by the defendant requires the engine bell to be rung on approaching tunnels and until they are passed and the whistle to be sounded at all whistling-posts. However, sounding the whistle or bell does not necessarily acquit the railroad company of negligence for the reason that the circumstances may be such as to make it the duty of the company to do more than to blow the whistle and ring the bell: 33 Cyc. 812, note.

While there was no evidence that Gaffney was not riding on the end of the front car except the inferences to be drawn from the evidence of Landerking and Schulz yet their testimony and particularly that of Landerking made it proper for the court to ask the jury to decide whether Gaffney was in the middle and on top of the reserve tender or whether he was on the buffer beam where he claims to have been. Rule 102 declares that when cars are pushed by an engine "a flagman must take a conspicuous position on the front of the leading car," a position in the middle of the top of the car would not be on the front of the car; and hence it was a question of fact for the jury to decide whether Gaffney was on the front or in the middle of the car. The defendant is chargeable with negligence if Rule 102 was violated; but, of course, the defendant would not be liable for that act of negligence unless there was a causal connection between such negligence and the death of Framhein.

The defendant earnestly insists that it was under no obligation to have a light on the forward end of the train while backing the engine through the tunnel with its tender and a reserve tender forming the front end of the train. Many and probably most of the au-

thorities declare that it is negligence to run a train in the night-time without a light. It is not necessary for the purposes of the instant case to decide whether running a train backward without a light in the night-time is as a matter of law a violation of the company's duty to its employees but it is sufficient to say that it would at least be a question of fact for the jury to determine whether running a train backward without a light in the night-time would be a failure to do what would be done by an ordinarily prudent man: *Southern Ry. Co.* v. *Sanders,* 145 Ky. 679 (141 S. W. 77); *Hammett* v. *Southern R. Co.,* 157 N. C. 322 (72 S. E. 1077); *Oliver* v. *Roach,* 31 Ky. Law Rep. 284 (102 S. W. 274); *Burling* v. *Illinois Cent. R. R. Co.,* 85 Ill. 18; *Kansas City Southern Ry. Co.* v. *Langley* (Okl.), 160 Pac. 451; *Hargrave* v. *Shaw Land etc. Co.,* 111 Va. 84 (68 S. E. 278, Ann. Cas. 1912A, 151); 23 Am. & Eng. Ency. of Law (2 ed.), 757; 33 Cyc. 958. The need of a light arises when darkness exists. It is because of the darkness that a light is needed. The sun may be below the horizon and thus cause darkness, or it may be above the horizon and yet its rays may be shut out and thus cause darkness; but in either event the need of a light on a train results from the condition of darkness rather than from the cause of that condition; and hence, reasoning by analogy, if a light is needed between sunset and sunrise because it is dark it may also be needed between sunrise and sunset in a tunnel where the condition of darkness exists. The defendant's motions for a nonsuit and a directed verdict were properly overruled.

The decedent assumed both the risk of the work train running without a schedule and also the risk of the tunnel itself being unlighted. Framhein assumed all the risks that were ordinarily incident to his employ-

ment and also extraordinary risks which he knew, or ought to have known, and appreciated: *Galvin* v. *Brown & McCabe,* 53 Or. 598, 611 (101 Pac. 671). A railroad company is not bound to install lights along the entire length of its tracks so that the right of way may be lighted in the night-time; nor was there any independent duty to install lights in the tunnel. For all practical purposes it is probable that a lighted train in an unlighted curved tunnel would be more likely to give notice of an approaching train than would an unlighted train in a lighted tunnel. However, even though it be supposed that it was the duty of the defendant to light the tunnel, nevertheless the failure of the company to install lights in the tunnel does not make it liable. It is conceded that the tunnel never had been lighted. Framhein knew that the tunnel was dark, because in the performance of his duties he necessarily passed through it from time to time and consequently if the darkness of the tunnel was an extraordinary peril produced by the negligence of the company it was a peril which Framhein must be deemed to have assumed.

The defendant seeks to apply the doctrine of assumed risk to the failure to maintain a light on a train while backing through the tunnel. It is true that the evidence is to the effect that the train was backed through the tunnel on June 26th in the same manner in which it had previously been backed, but there is no evidence that Framhein knew of this practice; and therefore if it was negligence not to maintain a light on the train the risk was an extraordinary peril unknown to Framhein and not assumed by him: 3 Labatt on Master and Servant (2 ed.), p. 3203; *Barley* v. *Southern Ind. R. Co.,* 30 Ind. App. 406 (66 N. E. 72).

The decedent knew that the work train was run without a schedule. Kirby warned Framhein before he left Walton; Larsen warned him at the bridge near Cushman; the purpose for which the train was used probably made a schedule impracticable; and therefore, even though it be supposed, without deciding, that it was negligence to run the work train without a schedule it was a risk which Framhein assumed.

Aside from and independent of the requirements of Rule 772 and the instruction contained in the letter of April 12, 1916, it was the duty of Framhein to exercise care to protect himself; and if he failed to exercise reasonable care to discover the approach of the train he was negligent: *Hawley* v. *Chicago, B. & Q. Ry. Co.*, 71 Iowa, 717 (29 N. W. 787).

The letter advising Framhein of the shipment of the motor car warned him

"in rounding curves on obscure points, have your car under complete control at all times and do not proceed without properly protecting yourself or flagging."

Rule 772, so far as material here reads as follows:

"Hand cars, motor cars (section and inspection cars), push cars, gravity cars, and velocipedes must be run with great caution at all times and particularly at night and in fogs. When the view of approaching trains in either direction is so obscured by any cause that there would not be ample time to remove the car from the track before being struck by a train running at maximum allowable speed, stop signals must be used in either or both directions, as may be necessary.

"Employees operating inspection cars (motor cars or velocipedes) who have not enough assistance to flag in either or both directions when necessary, as herein prescribed, must walk with their cars until the view for a safe distance is not obscured in either direction.

"All cars must display a white light to both front and rear when operated between sunset and sunrise. * * "

If Framhein disobeyed Rule 772 by riding on instead of walking with the speeder and if such disobedience was causally connected with the collision then he was guilty of contributory negligence: 3 Labatt on Master & Servant (2 ed.), § 1281; 18 R. C. L. 659; 26 Cyc. 1267. Both the plaintiff and the defendant allege that Framhein was riding on the speeder. The complaint avers that the decedent "was required to ride through said tunnel No. 4 on the said motor car * * and in so doing * * " was struck by the train. Again, the plaintiff says in his complaint that the train ran into him while he "was proceeding through said tunnel on said motor car." The answer alleges that Framhein met his death by causing a motor car "on which he was riding" to collide with the train. If the view of an approaching train was so obscure that there would not be ample time to remove the speeder from the track before being struck by a train running at maximum allowable speed then it was the duty of Framhein, under Rule 772, to walk with his car, until the view for a safe distance was not obscured in either direction. This phase of Rule 772 was not submitted to the jury in any manner; but the court instructed the jury that "the only evidence in this case which you can consider as a violation of Rule 772 is the evidence with reference to the rate of speed which Framhein was traveling at the time of the accident." The question of the duty of Framhein to walk "until the view for a safe distance is not obscured" should be submitted to the jury upon a retrial.

Two applications for employment, one dated October 25, 1915, and the other dated April 16, 1916, were re-

ceived in evidence. Each of these applications purports to be signed by William J. Framhein and both acknowledge receipt of a copy of the rules and regulations for the government of employees of the operating department of the company; and each application also contains an agreement on the part of Framhein to familiarize himself with and observe all the rules and regulations. If Framhein signed the applications for employment, and received a copy of the rules and was able to read he must be deemed to have had knowledge of Rule 772 since he had a reasonable opportunity to familiarize himself with the rules: *Georgia Pacific R. Co.* v. *Dooly*, 86 Ga. 294 (12 S. E. 923, 12 L. R. A. 342, 345); *Darracott* v. *Chesapeake etc. R. R. Co.*, 83 Va. 288 (2 S. E. 511, 5 Am. St. Rep. 266); *Little* v. *Southern Ry. Co.*, 120 Ga. 347 (47 S. E. 953, 102 Am. St. Rep. 104, 66 L. R. A. 509); 18 R. C. L. 661; 3 Labatt on Master & Servant (2 ed.), § 1133.

The judgment should be reversed and the cause remanded for a new trial.

BEAN, J., concurs.

Argued June 26, affirmed July 23, decree modified September 17, 1918.

GREEN *v.* LINNHAVEN ORCHARD CO.

(174 Pac. 620, 621.)

Vendor and Purchaser—Remedies of Purchaser—Lien for Purchase Money—Priorities.

1. The purchaser's equitable lien against the land for the amount of the price paid does not attach until the time of payment, and in an action to determine priorities, the failure of the purchaser to allege or prove date of payment bars an investigation of his claim of priority.

[As to lien of vendee, see note in 127 Am. St. Rep. 873.]

From Linn: WILLIAM GALLOWAY, Judge.

Department 2.

This is a suit for the foreclosure of mortgages. The complaint is in the usual form, and recites the execution of the note and mortgage on May 9, 1912, and that the instrument was recorded on the same day.

The defendant, Frank J. Miller, filed an answer and cross-complaint seeking the foreclosure of a second and subsequent mortgage upon a portion of the same real property, which he holds as assignee for value. Thereafter certain other defendants, jointly filed their answer and counterclaim, wherein they allege that prior to the execution of either of the mortgages referred to they had severally entered into written contracts with the defendant, Linnhaven Orchard Company, the mortgagor, for the several tracts of land described in the mortgages, had made some payments thereon, and that thereafter upon discovering that they had been deceived and defrauded by false representations of the Orchard Company, and that this corporation had breached the contracts by its failure to perform a number of the covenants therein, they rescinded their contracts and demanded a return of the payments theretofore made by them upon the purchase price, which demand having been refused, they seek to have a decree impressing liens upon the several tracts for such payments and pray for the foreclosure of such liens.

To this pleading the plaintiff filed a reply denying the priority of such liens to plaintiff's mortgage.

The parties to these various pleadings then entered into a stipulation, of which the essential paragraph reads thus:

"It is further stipulated between said parties that said purchasing defendants admit all the allegations of said further and separate answer and cross-com-

plaint of said Frank J. Miller, and said Frank J. Miller admits all the allegations of said further and separate answer and counterclaim of said purchasing defendants, except neither party admits the question of priorities, it being the intention of the parties to this stipulation to admit all of the facts pleaded in the respective pleadings, of the other party, and not conclusions, and that the intent of this stipulation is to leave for determination by the court, the priorities of the mortgage of said defendant Miller, and the claims of said purchasing defendants, which is hereby submitted upon the pleadings."

The case having been submitted, there was a decree foreclosing the various liens, fixing the priority thereof in the following order: (1) Plaintiff's mortgage; (2) Defendant Miller's mortgage; and (3) the equitable liens of the defendants seeking to recover the sums paid by them under their contracts to purchase the lands. From this decree the last-mentioned defendants appeal. AFFIRMED.

For appellant there was a brief over the names of *Mr. John McCourt, Mr. Samuel M. Endicott* and *Mr. Walter C. Winslow,* with an oral argument by *Mr. McCourt.*

For respondent, W. W. Green, there was a brief over the names of *Mr. William A. Williams* and *Mr. Roscoe P. Hurst,* with an oral argument by *Mr. Williams.*

For respondent, Frank J. Miller, there was a brief with oral arguments by *Mr. Gale S. Hill* and *Mr. Willard S. Marks.*

BENSON, J.—1. There is but one vital question submitted for our consideration and that relates to the priority of the several liens. Owing to the stipula-

tion of the parties and the manner in which the case is submitted we must look to the pleadings for the facts. From these we learn that plaintiff's mortgage was executed and recorded on May 9, 1912, and defendant Miller's mortgage was executed on January 20, 1913, and recorded on February 10, 1913. The only information we find in the record as to the dates of appellants' liens is found in a paragraph of their answer reading as follows:

"That thereafter defendant Linnhaven Orchard Company, by means of said false and fraudulent representation set forth and alleged above, sold to defendants mentioned herein, who here relying upon said representations as aforesaid made by the said defendant Linnhaven Orchard Company, did each for himself enter into a contract for the purchase of tracts in the said Linnhaven tracts for the prices herein set forth and upon which each of said defendants respectively has paid the amount herein mentioned, to wit:

Name.	Date of Contract.	Tract No.	Pur. Price.	Amt. Paid.
R. G. Grant	Aug. 24, 1910	139	$3600	$1800
Charles W. Chech	Aug. 24, 1910	136	$3600	$1800
H. E. Grant	Aug. 24, 1910	138	$3600	$1800
A. R. Grant	Aug. 24, 1910	137	$3600	$1800
G. M. Gault	Jan. 16, 1911	135	$3600	$1800
H. E. Still	Mar. 8, 1911	133	$3600	$1800
H. E. Still	Mar. 8, 1911	134	$3600	$1800
Harold Smith	Feb. 14, 1911	132	$3600	$1200"

It will be observed that there is nothing in this paragraph which indicates in the slightest degree, the date of any payment, and the record is also silent as to the terms of the contract upon that subject. Counsel for appellants assume that the lien for the purchase money attaches as of the day when the contract is executed, but they have not furnished any citation of authority in support of this assumption, and we have been unable to find any. It seems to us quite clear,

that in any event the equitable liens of these defendants could not attach until there had been a payment. It is not the execution of the writing, but the payment of the money which gives the vendee the right to a lien for its recovery. In 2 Jones on Liens (3 ed.), Section 1105, the following language is used:

"Money paid by a vendee of land prematurely, or before receiving a conveyance, is a charge upon the estate in the hands of the vendor, or in the hands of his grantee with notice. And so, if a purchaser makes a deposit on account of the purchase money, at the time of executing an agreement of purchase, which is not complete because the vendor is unable to give a good title, the purchaser has a lien upon the land for the money so paid. 'There can be no doubt, I apprehend,' says Lord Cranworth, 'that when a purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow as a necessary corollary, that, to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase money, the vendor had executed a mortgage to him of the estate to that extent. It seems to me that that is founded upon such solid and substantial justice, that if it is true that there is no decision affirming that principle, I rejoice that now, in your Lordship's House, we are able to lay down a rule that may conclusively guide such questions for the future. I think, however, that there are some authorities which have been pointed out which have established that rule, in principle, if not in terms. But I think it is unimportant to go into that, because it is now established and will from henceforth be established as a very sound principle, founded on solid justice.' "

It follows that since appellants have failed to allege or prove any facts from which we may determine the dates at which their several liens attached, their contention must fail and the decree of the lower court must be affirmed. AFFIRMED.

McBRIDE, C. J., BEAN and JOHNS, JJ., concur.

Motion to modify decree allowed September 17, 1918.

ON MOTION TO MODIFY DECREE.

(174 Pac. 621.)

On motion to modify decree dated July 23, 1918. Allowed.

Mr. John McCourt, Mr. Samuel M. Endicott and *Mr. Walter C. Winslow,* attorneys for appellants and for the motion.

Mr. William A. Williams, Mr. Roscoe P. Hurst, Mr. Gale S. Hill and *Mr. Willard S. Marks, contra.*

BENSON, J.—On July 23, 1918, we handed down a decision in this case affirming the decree of the trial court. The counsel for the defendants who are appellants herein now call our attention to the fact that the decree fails to give them a judgment for the amounts of their several claims, although it assumes the existence of such a judgment, and directs the payment thereof out of the proceeds of the sale of certain property, after the payment of certain prior claims. This omission is clearly an oversight, and appellants' motion to modify the decree by adding thereto a judgment for their several claims is therefore allowed.

AFFIRMED. MOTION ALLOWED TO MODIFY DECREE.

Argued July 19, reversed and remanded September 17, 1918.

HUME v. MEARS.

(174 Pac. 1156.)

Contracts—Construction—Duty of Court.

1. Under Section 136, L. O. L., providing that the court shall determine the construction of statutes and other writings, the court must construe the written contracts made the basis of plaintiff's complaint.

Patents—Assignment of Invention or Right to Patent.

2. In view of international convention of March 20, 1883, as modified by supplementary treaty concluded at Brussels December 14, 1900, and ratified by the United States August 25, 1902 (32 Stat. 1936), where defendants, having acquired some rights under the United States patent laws, at least by application for patents, filed application for patent in Great Britain, defendants' English rights, even before issuance of patent in Great Britain, constituted a property right which was the legitimate subject of contract and sale.

Brokers—Right to Commission—Sale of Property—Contract.

3. In an action by a broker for his commission for sale of patent rights for which application was pending in Great Britain, the broker could not recover commission on proof of securing purchasers not willing to buy assignments of mere application rights, but insisting that they all first go to patent.

[As to what services by a broker entitle him to a commission, see note in 28 **Am. St. Rep.** 546.]

From Multnomah: ROBERT G. MORROW, Judge.

Department 1.

The plaintiff sues to recover damages for the breach by the United States Cashier Company and Thomas Bilyeu of a contract which the plaintiff alleges bound them to pay him a commission for finding a purchaser for certain British patent rights of which they claimed to be the owners. He claims as the assignee of a cause of action arising out of the contract made by the company and Bilyeu with one Goodbody and also for a breach of an agreement supplementary thereto made with the plaintiff himself. These contracts are set out as exhibits to the complaint and their execution is

admitted. Otherwise, that pleading is denied. After a jury trial there was a verdict and judgment for the plaintiff, from which the defendants appeal, the receiver of the company having been substituted as defendant in its stead. REVERSED AND REMANDED.

For appellants there was a brief over the names of *Messrs. Cake & Cake* and *Mr. Robert J. Upton,* with oral arguments by *Mr. H. M. Cake* and *Mr. Upton.*

For respondent there was a brief over the name of *Messrs. Clark, Skulason & Clark,* with an oral argument by *Mr. A. J. Skulason.*

BURNETT, J.—On September 25, 1912, the Cashier Company and Bilyeu as parties of the first part made the written agreement with Arthur E. Goodbody whereby they granted to the latter "the full right and privilege of selling and disposing of the English patent rights owned by them in the machine known as the Cashier Machine and the machines which have been developed therefrom by the said Cashier Company or which may hereafter be developed therefrom," in the kingdom of Great Britain and Ireland. It was stipulated therein that "the price which the said Cashier Company and the said Bilyeu shall receive for the assignment of their patent rights covering said machines in Great Britain shall be the sum of fifteen thousand pounds sterling, and to be paid in cash in hand at the time of the delivery of the assignments of said patent rights by the parties of the first part." In addition to this, 20 per cent of the patent rights was reserved by the company, together with 20 per cent of the stock of any company which might be formed to take over the rights. The contract further provided that Goodbody should receive "as his full commission

and compensation for negotiating the sale of said patent rights a 10 per cent commission upon the purchase price hereinbefore mentioned to be paid in cash." After other stipulations not now important, the contract proceeds thus:

"When the said sale is completed and the payment is made as hereinbefore agreed, assignments shall be delivered to the purchasers which will assign and convey to such purchasers the British rights covering all of the applications which have been made by said Bilyeu or by him in conjunction with other parties, covering said machines in the United States and particularly the application for patent which the said Bilyeu has already filed in said Great Britain. Assignments shall be delivered by the said Cashier Company covering the British rights for all improvements, modifications and additions to said machines which have been developed by said Cashier Company and for which patent application has been or may hereafter be made by said Cashier Company in the United States."

Provision was also made for furnishing one United States Commercial and Payroll Machine, a model of the machine adapting it to British coinage, and blueprints covering the design, mechanism and construction of the different machines, and the company and Bilyeu promised to render friendly aid to the party of the second part in the negotiations for the sale of said patent rights, and to co-operate with him in furnishing data and information concerning their rights in the United States. Later, on August 18, 1913, the company and Bilyeu as parties of the first part, and the plaintiff here in his own proper person as party of the second part, made a written agreement of that date authorizing the plaintiff to go to England and aid Goodbody in "consummating a sale * * upon the terms in the Goodbody contract hereinbefore referred

to." The plaintiff claims that he and Goodbody performed all the terms of their several contracts and in each instance assigns a breach by the defendants, as follows:

"That notwithstanding the premises and the performance by the plaintiff upon his part of the conditions of said contracts the defendants refused, neglected and failed to perform the conditions thereof upon their part to be performed by refusing, neglecting and failing to sell or assign, or in any manner transfer to the said purchasers the said British patent rights, or any part thereof, although requested so to do by the plaintiff and the said purchasers, by reason of which refusal and neglect upon the part of the defendants the sale thereof failed of consummation."

The plaintiff claims that by reason of the breach thus assigned he is damaged in the loss of his commission, for himself the sum of $14,000 and for Goodbody the sum of $7,500.

1. Section 136, L. O. L., reads thus:

"All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it; and whenever the knowledge of the court is by this code made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it as conclusive."

It was therefore the duty of the Circuit Court at the trial, and it is required of this court in considering the case, to construe the written contracts which the plaintiff makes the basis of his complaint: *Oregon-Wash. R. & N. Co.* v. *Coolidge,* 59 Or. 5 (116 Pac. 93); *Chadwick* v. *Oregon-Wash. R. & N. Co.,* 74 Or. 19 (144 Pac. 1165); *Dahlstrom* v. *Hudelson,* 80 Or. 520 (157 Pac. 798).

2. The evidence shows this situation at the time the Goodbody contract was made, on September 25, 1912: Having acquired some rights under the patent laws in the United States, at least by application for patents here, the defendant Bilyeu filed an application for a patent in Great Britain July 10, 1912. At the time of making the Goodbody contract this was the only British right either of the defendants had. It may be stated in passing that the evidence shows the above-named British application was accepted April 12, 1913, and the patent granted in pursuance thereof was sealed July 10, 1913. In December, 1912, the defendants filed in England two other applications for patents covering improvements on the original machines described in the application of July 10, 1912. No patent was granted on the December application.

It is said in *Richardson Shoe Machinery Co.* v. *Essex Machine Co.*, 207 Mass. 219, 222 (93 N. E. 650):

"The inventor or his assignee has before the issuance or allowance of a patent an inchoate right of property in his invention and in a pending application for a patent, which he may assign or with which he may deal as with an article of property."

See, also, *Cammeyer* v. *Newton*, 94 U. S. 225 (24 L. Ed. 72); *Hammond* v. *Mason & Hamlin Organ Co.*, 92 U. S. 724 (23 L. Ed. 767); *Hendrie* v. *Sayles*, 98 U. S. 546 (25 L. Ed. 176); *Dalzell* v. *Dueber Watch Case Mfg. Co.*, 149 U. S. 315 (37 L. Ed. 749, 13 Sup. Ct. Rep. 886). By the international convention of March 20, 1883, as modified by the supplementary treaty concluded at Brussels December 14, 1900, and ratified by the United States by the proclamation of the President August 25, 1902, to which the kingdom of Great Britain was a party as well as the United States of America, it is provided in Article IV that:

"Anyone who shall have regularly deposited an application for a patent of invention, or an industrial model, or design * * in one of the contracting States, shall enjoy for the purpose of making the deposit in the other States and under the reserve of the rights of third parties, a right of priority during the periods hereinafter mentioned,"

which periods are prescribed to be twelve months for patents of invention: 7 Fed. Stats. Ann. 875.

It is plain under these authorities that the defendants even at the time of making the Goodbody agreement had a property right which was the legitimate subject of contract and sale. Further, the patent of July 10, 1913, having been issued in England, as shown by the testimony, at the time of making the contract directly with the plaintiff, and application having been filed in December of the year previous, in Great Britain, the defendants had still further property which was available for transfer.

3. The plaintiff and his assignor obligated themselves not merely to find a purchaser but to effect a sale. This is written large throughout the contract. Without dispute, the testimony shows that they were well advised of what the defendants had for sale. It is explicitly stated in both contracts what the defendants were to do, which was to make assignments to be delivered to the purchasers, conveying to them "the British rights covering all of the applications which have been made by said Bilyeu or by him in conjunction with other parties * * particularly the application for patent which the said Bilyeu has already filed in said Great Britain." Out of the mouth of the plaintiff himself it appears that he aided Goodbody in securing the attention of some men of reputed wealth in London but, like most conservative capitalists, they refused to buy the rights which were grounded only on appli-

cations and they insisted that they would not embark in the venture until all the applications, including those of December, 1912, had gone to patent.

It appears that the December applications were supposed to conflict with a previous application said to cover the same invention in some particulars. At any rate, for some reason or other, at the time the plaintiff demanded his commission the patent had not yet been issued on the December application. If the plaintiff would recover on the contract, he must show that he carried negotiations so far that the proposed purchasers had accepted the assignments of British rights covering the applications as stated in the contract. The plaintiff's own testimony shows, as stated, that the capitalists with whom he negotiated in London were not willing to accept such assignments, but insisted upon sealed patents, which as to the December applications had not yet been granted. The plaintiff failed to show that he had effected such a sale as would be covered by the assignments the defendants had covenanted to make. In substance, the defendants offered for sale all the rights they had in Great Britain, part of which rested in applications for patents and not in issued or sealed patents. The application rights were legitimate subjects of sale and were recognized as such by the terms of the contracts. The proposal of the defendants embodied in their agreements and what they bound themselves to do by the excerpt from the contract already set out was to assign the British rights covering these applications. If the plaintiff would recover for effecting a sale, or obtain damages for defendants' breach of contract, he must show that the parties to whom he sold irrevocably accepted the offer of defendants precisely as made. Indisputably, however, the evidence discloses that the possible pur-

chasers were not willing to buy mere application rights but insisted that they all first go to patent. They could accept the assignments covering applications as proposed by the defendants, or not, as they chose, and hence there was no sale effected. The contracts do not bind the defendants to obtain patents. The case is one where the brokers failed to sell what the defendants had for sale.

The question of failure of proof was raised by a motion for a nonsuit at the close of plaintiff's testimony. The plaintiff resisted this and the court overruled it. At the end of all the testimony the defendants renewed the objection to plaintiff's case by a motion to direct a verdict in their favor, which was also denied. The court was in error in both instances. The judgment must therefore be reversed and the cause remanded with directions to enter a judgment for the defendants. REVERSED AND REMANDED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued July 19, reversed September 17, 1918.

MASTERS *v.* WALKER.

(174 Pac. 1164.)

Principal and Agent—Ratification—Effect.

1. When the principal, with knowledge of all facts, ratifies a transaction unauthorized when performed, he adopts the act as of the time of its performance, as much as if he had done it himself.

[As to effect of ratification by principal of agent's act, see note in 5 Am. St. Rep. 109.]

Principal and Agent—Pleading—Proof—Act of Agent.

2. Under an allegation that an act was done by defendant, plaintiff can show the act was done by defendant's agent, or that it was afterward ratified.

Principal and Agent—Action Against Agent—Pleading.

3. Plaintiff, seeking to hold a principal on account of his agent's act, later ratified, should allege the act directly as defendant's, and not state that the business was done by an agent, and later ratified by defendant.

Principal and Agent—Action for Fee—Question for Court.

4. In an attorney's action for a fee, he could show that defendant's general agent employed him in her behalf, and it was for the court to decide, from the facts shown, whether the act was within the agent's authority.

Principal and Agent—Existence or Extent of Agency—Question of Law and Fact.

5. If there is a dispute about the extent of an agency, a mixed question of law and fact is presented, which should be submitted to the jury.

Principal and Agent—Existence or Extent of Agency—Question of Law and Fact.

6. If there is a dispute about the existence of an agency, a mixed question of law and fact is presented, which should be submitted to the jury.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 1.

Alleging that he was a regularly admitted attorney at law, the plaintiff states:

"That on or about the —— day of April, 1914, defendant employed plaintiff as her attorney to act in the defense of a certain case then pending in the District Court of the United States for the District of Oregon,"

numbering and entitling it, to which the defendant was a party:

"That plaintiff entered on the defense of said suit and conducted the same to final determination and on or about December 15, 1915, plaintiff and defendant had an accounting together as to the amount due plaintiff for conducting the defense of said case and at said time it was understood and agreed between plaintiff and defendant that defendant should pay plaintiff for said services the sum of $4,000, which sum defendant promised and agreed to pay plaintiff."

Averring that only part of the amount had been paid, the plaintiff demanded judgment for the balance.

The answer admitted the plaintiff's character as a practicing attorney, but denied all of the other allegations of the complaint. At the trial the court refused sundry offers of the plaintiff which he claims tended to prove his case, and cast him in a judgment of nonsuit, from which he appeals. REVERSED.

For appellant there was a brief over the names of *Mr. John F. Reilly* and *Mr. W. Y. Masters,* with an oral argument by *Mr. Reilly.*

For respondent there was a brief over the name of *Messrs. Dey, Burnett & Hampson,* with an oral argument by *Mr. A. A. Hampson.*

BURNETT, J.—1. From an exceedingly garrulous bill of exceptions we discern that substantially but two questions are presented by the record. The plaintiff offered to show for one thing that his actual employment took place through an agreement with an attorney previously employed by the defendant in the federal litigation mentioned and that the latter ratified this employment and agreed to pay for the same. He also endeavored to prove that the attorney who employed him was the general agent of the defendant and as such acted for the defendant in the matter of engaging the plaintiff's services as stated in the complaint. These offers were rejected. The ruling of the court on the first contention seems to have been based on the theory that if the plaintiff here would rely upon a ratification of an act which was unauthorized at the time it was performed, the ratification must be pleaded.

"By ratifying the unauthorized act, the principal assumes and adopts it as his own, and as has been seen, this adoption extends to the whole of the act,—it goes back to its inception and continues to its legitimate end. * * 'The ratification operated upon the act ratified precisely as though the authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification.' And this rule applies as well to corporations as to individuals": 1 Mechem on Agency (2 ed.), § 483. See, also, 2 C. J. 467, 516.

The essence of the rule is that when the supposed principal, with knowledge of all the facts, ratifies a transaction which was unauthorized when performed, he adopts the act as of the time of its performance and makes it his own, as much as if he had been then and there personally present and executed it himself.

2. It is good pleading to allege that an act was done by the defendant, and it is competent to prove that averment by showing that the act was really done by an agent of the defendant thereunto duly authorized, or that it was afterward ratified by the defendant: *Kitchen* v. *Holmes,* 42 Or. 252 (70 Pac. 830); *Levy* v. *Nevada, C. & O. Ry.,* 81 Or. 673 (160 Pac. 808, L. R. A. 1917B, 564); *Slevin* v. *Reppy,* 46 Mo. 606; *Hoosac Mining & Milling Co.* v. *Donat,* 10 Colo. 529 (16 Pac. 157); *Long* v. *Osborn,* 91 Iowa, 160, 163 (59 N. W. 14); *Hubbard* v. *Williamstown,* 61 Wis. 397 (21 N. W. 295); *Moore* v. *McClure,* 8 Hun, 557; *Hand* v. *Society for Savings,* 18 N. Y. Supp. 157; *Smith* v. *Des Moines Nat. Bank,* 107 Iowa, 620 (78 N. W. 238); 2 C. J. 904.

3. The ultimate question to be determined is whether the transaction is that of the defendant within the meaning of the law. One seeking to establish the affirmative of that proposition should allege it directly and not endeavor to arrive at the result by circumlocu-

tion or argumentative statement. The allegation may be proved by direct testimony or by evidence of facts from which the law draws the conclusion that the act was that of the principal. It savors strongly of pleading evidence or at least redundancy for the pleader to state that the business under consideration was done by an agent or that, having been transacted without the defendant's sanction, it was afterward ratified by him.

4–6. It was proper also for the plaintiff to show that the defendant's general agent employed him in her behalf, it being for the court to decide from the facts shown whether the act was within the scope of the agent's authority. Of course, if there should be a dispute about the existence or extent of the agency, there would be presented a mixed question of law and fact which should be submitted to the jury under suitable instructions as to the law.

If the defendant employed the plaintiff as her attorney and he performed the services for which he was engaged, an indebtedness arose in favor of the plaintiff which was the proper subject of an accounting between them.

The plaintiff was wrongfully deprived of his right to prove his case. The judgment is reversed for further proceedings. REVERSED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued May 21, affirmed September 17, 1918.

DRAINAGE DISTRICT No. 7 *v.* BERNARDS.

(174 Pac. 1167.)

Drains—Conclusiveness of Determination—Benefits.

1. Where court, upon land owner's objection to inclusion of his land in proposed drainage district, decided such land would be benefited by the ditch and subsequently upon objection to levy of assessment and to amount thereof made similar finding, owner cannot raise same question on district's action to foreclose the lien of assessment.

Drains—Purpose of Drainage—Public Use—Health.

2. Drainage for benefit of the public health is for a public use.

Drains—Purpose—Public Benefit—Agriculture—Swamp-land.

3. The reclamation of large tracts of swampy lands for agricultural purposes is generally considered to be for the public benefit.

Eminent Domain—Public Uses—Drainage District.

4. Laws of 1889, page 25 (Section 6126, L. O. L.), as amended by Laws of 1911, page 424, providing for organization of drainage district upon petition of 25 per cent of owners desiring to drain land "for the public benefit for sanitary purposes," and Section 6128, L. O. L., as amended by Laws of 1911, page 424, requiring court to find that "district is of public utility and importance," provide for drainage for public uses and do not authorize taking of private property for private purposes.

[As to drainage districts, see note in Ann. Cas. 1915A, 9.]

Drains—Drainage District—Statute—Petition.

5. Section 6126, L. O. L., as amended by Laws of 1911, page 424, providing for organization of drainage district for public benefit and requiring petition to state "necessity for such drainage," *held* to require petition to allege that district is to be for a public purpose, and hence not unconstitutional.

Drains—Drainage District—Statute—Petition—Public Purposes.

6. A statute providing for organization of drainage districts is not necessarily unconstitutional because of failure to expressly require petition to allege the proposed district to be a public necessity.

Constitutional Law—Due Process—Special Assessment—Notice.

7. Though special assessment cannot be imposed upon property unless notice be given and owner afforded opportunity to be heard at some stage of the proceedings, personal notice is not required, and notice by publication or by posting is sufficient.

Drains—Drainage Districts—Statutes—Notice.

8. Section 6126, L. O. L., as amended by Laws of 1911, page 424, relating to formation of drainage districts and providing for published, posted and personal notice to owners of land within proposed district, is valid though provision as to personal service is too uncertain to be enforceable, provision as to notice by publication and post-

ing being sufficient, though no provision as to notice would have been necessary to statute's validity.

Statutes—Validity—Unconstitutionality of Part.

9. An entire statute is not invalid because one or more of the details or minor provisions or incidental clauses are unconstitutional, where invalid part may be eliminated without materially affecting the general purpose.

Statutes—Partial Invalidity.

10. Section 6136, L. O. L., as amended by Laws of 1911, page 424, providing for notice of assessment for drainage benefits by posting on bulletin in the courthouse and in such other manner as County Court may prescribe, *held* not invalid even though provision as to posting be declared invalid because of uncertainty; any notice by posting or publication being sufficient to satisfy "due process of law" requirement, and elimination of invalid part leaving valid remainder which gives court power to prescribe method of notice.

Constitutional Law—Drains—Delegation of Legislative Power to Judiciary.

11. Section 6136, L. O. L., as amended by Laws of 1911, page 424, giving court right to prescribe notice to be given land owners in drainage district of assessment for drainage benefits, *held* not a delegation of legislative power to the judiciary.

Drains—Drainage Districts—Organization—Notice.

12. A drainage district cannot be legally organized unless notice be given as prescribed by Section 6126, L. O. L., as amended by Laws of 1911, page 424.

Drains—Drainage Districts—Assessment—Notice.

13. An assessment for drainage benefits is not valid unless notice is given as provided by Section 6136, L. O. L., as amended by Laws of 1911, page 424.

Drains—Assessment—Action—Evidence—Notice.

14. In action to foreclose lien of assessment for drainage benefits where fact of service of notice of the organization of the district actually existed, it was competent in Circuit Court to supplement the proof of service submitted to the County Court, who had jurisdiction over organization of the district, with the parol testimony of deputy sheriff, who claims to have served notice.

Drains—Statutes—Assessment—Enforcing Payment.

15. Laws of 1915, page 540, repealing by implication Sections 6126–6145, L. O. L., relating to drainage districts, does not prevent a district from enforcing payment of a delinquent assessment, where all assessment proceedings were completed before the act of 1915 became effective; the assessment under Section 6136, L. O. L., as amended by Laws of 1911, page 424, having become lien on land, and act of 1915, although without saving clause, operating prospectively and not retrospectively.

Statutes—Construction—Change of Statute.

16. A change of statute will ordinarily be construed, if practicable, as having a prospective operation only.

Constitutional Law—Bancroft Bonding Act—Contract Rights.

17. Where owners of land assessed for drainage benefits sign applications for right to pay in annual installments under Bancroft Bonding Act, they enter into contract which cannot be impaired by subsequent legislation.

Statutes—Repeal—Effect on Pending Litigation.

18. The general rule is that the repeal of a statute without any reservation takes away all remedies given by repealed statute and defeats all actions pending under it at the time of its repeal; but, where repealing act relates to matters of procedure and substitutes new forms in place of old pending actions and proceedings already taken are not affected.

From Washington: GEORGE R. BAGLEY, Judge.

Department 2.

For appellants there was a brief over the names of *Messrs. Huston & Huston* and *Mr. H. T. Bagley,* with an oral argument by *Mr. S. B. Huston.*

For respondent there was a brief over the names of *Mr. E. B. Tongue* and *Mr. Thomas H. Tongue, Jr.,* with an oral argument by *Mr. E. B. Tongue.*

PER CURIAM.—This is a suit to foreclose the lien of an assessment levied by the plaintiff for the purpose of paying for a ditch which the drainage district proposes to construct. The questions to be decided can be better considered if we first give a brief account of the history of the drainage district, including a narrative of what the defendants did.

A petition signed by thirty-one land owners was filed with the County Court on August 12, 1912, asking for the creation of drainage district No. 7, as provided for by Sections 6126 to 6145, L. O. L., inclusive, as amended by Chapter 241, Laws 1911. The proposed boundaries embraced approximately 2,700 acres owned by about sixty-seven persons. The defendant, Hubert Bernards, was the fee-simple owner of two tracts of

land within the boundaries of the proposed district, but his son Herman Bernards occupied the premises. The County Court fixed September 16, 1912, as the time for hearing the petition. The petition was published four weeks and was posted for the same length of time on the bulletin-board in the county courthouse and a copy was served on each record owner including Hubert Bernards. On September 16, 1912, the petitioners and objectors appeared in the County Court and thereupon the hearing was continued until September 24, 1912. Hubert Bernards and two others reduced their objections to writing and filed the paper with the County Court on September 23, 1912. The remonstrance signed by Bernards alleged: that the benefits will not exceed the cost; and that the Bernards lands should be excluded from the proposed district for the reason that they would be damaged rather than benefited. On September 24, 1912, the petitioners and objectors appeared with their respective attorneys. After hearing all the evidence submitted by the parties the County Court excluded six certain tracts of land owned by different persons and also a part of the lands owned by Hubert Bernards and then overruled the remonstrance signed by Bernards and approved the petition in compliance with Section 6128, L. O. L., as amended by Chapter 241, Laws 1911.

The plaintiff caused a line for a ditch to be located, surveyed and staked out through the drainage district; afterwards the engineer prepared specifications and estimates for the proposed ditch; and then on August 18, 1914, a complete report of what had been done was filed with the County Court by the board of directors. The County Court approved the report and appointed viewers to assess the benefits to be derived from the ditch. After viewing the premises and

making the assessments, the viewers made a report to the County Court on September 4, 1914, showing the description of each tract of land, the name of the owner, the number of acres in each tract and the amount of the assessments charged against the respective tracts of land. The court fixed October 9, 1914, as the time for hearing the report and considering any objections that might be made. Notice of the hearing was duly given. On October 9, 1914, Hubert Bernards filed objections to the assessments made against his lands alleging that his property would not be benefited and that the assessment was unjust. The court postponed the hearing until October 15, 1914, when the plaintiff and its attorneys, Hubert Bernards and his attorneys and several other owners of land in the district appeared and submitted their evidence to the County Court. On the following day the County Court overruled the objections filed by Hubert Bernards, approved the assessment of $528.89 against his lands, and ordered the assessment to be docketed. With the exception of Hubert Bernards all the 67 persons owning land in the district have either paid their assessments or made application under the Bancroft Bonding Act to pay the amount in annual installments. The assessment against the Bernards property became delinquent, and pursuant to the order of the County Court this suit was brought for the collection of the assessment as provided by Section 6136, L. O. L., as amended by Chapter 241, Laws 1911.

On March 14, 1914, the drainage district commenced an action against the defendants for the condemnation of a right of way for the ditch to be dug across the Bernards lands. The action came on for trial on May 1, 1914, and while the jury was viewing the premises the plaintiffs and defendants entered into an agree-

ment settling the controversy. The agreement was not formally reduced to writing. The plaintiff agreed to dismiss the action and to pay Hubert Bernards $525. The defendants agreed that Hubert Bernards would convey a right of way to the district. The plaintiff claims that Hubert Bernards agreed to "do whatever was in his power to assist in the establishment, maintenance and carrying out of the objects of said drainage district," and that "he reserved only the right to contest the amount of any assessment that might be levied against his property."

The record does not show whether Herman Bernards was in possession as a lessee or whether he merely occupied the premises as a hired man or otherwise in 1912. Afterward Hubert Bernards conveyed the property to his son Herman Bernards, subject, however, to a life estate reserved by Hubert Bernards. The exact date of this transfer is not disclosed by the record, although it does fairly appear from the testimony that the conveyance was made in 1915, "before the first of March, so it would be assessed to" Herman Bernards.

Twenty-two separate sheriff's returns were made and filed prior to the hearing of the petition for the organization of the district. Some of these returns showed service of the petition upon a single person while others recited service upon more than a single owner or person in possession, but none of the returns mentioned the name of Herman Bernards. The order made by the County Court on September 24, 1912, recites that: "it appearing to the court from the returns of" the sheriffs of four different counties

"that all the record owners and persons in possession of the lands included within the district proposed to be established as said drainage district, as described

in said petition, have been personally served within the county in which they reside, with a copy of the petition and a copy of the notice showing when said petition would be presented."

On April 17, 1916, the drainage district filed a motion in the County Court, supported by an affidavit bearing the same date, for an order authorizing an amendment of the sheriff's return so as to show that Herman Bernards had been regularly served with a copy of the petition. The accompanying affidavit was made by O. E. Quick, who swore that during the month of September, 1912, Geo. G. Hancock was the sheriff and the affiant was a deputy sheriff of Washington County; that on September 1, 1912, the sheriff gave to the affiant for service on Herman Bernards a copy of the petition for the formation of the drainage district and a copy of the notice giving the time for the hearing, certified to by one of the attorneys for the petitioners; and that on September 4, 1912, the affiant delivered the copy of the petition and the copy of the notice to Herman Bernards personally in Washington County. On the same day, April 17, 1916, the County Court made an order permitting the sheriff's return

"to be amended so as to show that Herman Bernards was duly and legally and regularly served with a proper certified copy of said petition and notice of the hearing thereof within Washington County, Oregon, on September 4, 1912."

O. E. Quick appeared as a witness for the plaintiff in this suit and testified that he was still serving as deputy sheriff, although Hancock's term as sheriff had expired before April 17, 1916; and that he served the petition and notice on Herman Bernards on September 4, 1912, giving a detailed account of how he went to the premises, who was with him, and where

the service was made. The defendants offered contradictory evidence. The trial court made an express finding to the effect that Herman Bernards was served with a copy of the petition and notice prior to the time set for the hearing of the petition. At the very conclusion of the trial in the Circuit Court the defendants agreed that the order made by the County Court, on April 17, 1916, "may be treated as having been entered of record"; that it was "properly made"; and "a good and valid order."

The complaint alleges that the plaintiff is a duly organized and existing drainage district and then recites the successive steps taken in making and levying the assessment; the pleading avers that the Bernards assessment is delinquent and concludes with a prayer for a judgment against the property for the amount of the assessment and that the land be ordered sold for the purpose of satisfying the judgment.

Hubert Bernards and Herman Bernards and his wife answered by denying certain portions of the complaint and by alleging that: (1) the plaintiff was not a legally existing corporation because Sections 6126 to 6145, L. O. L., and Chapter 241, Laws 1911, were unconstitutional and void for the reason that the legislation attempted to provide for taking property without due process of law and without notice; (2) a copy of the petition was never served upon Herman Bernards and hence jurisdiction to organize the district was never acquired; and (3) the proposed ditch "will not in any way drain said lands and will not be in any way beneficial to said lands."

The reply contains an account of the remonstrance made by Hubert Bernards to the formation of the district and of the objections urged by him against the assessment and alleges that he ought to be precluded

from denying the validity of the organization of the district and from claiming that his lands would not be benefited, for the reason that it was twice decided by the County Court that his lands were properly included in the district and that his property would be benefited by a ditch and once decided that the amount of the assessment was proper and just.

The reply also gives an account of the commencement and settlement of the action for the condemnation of a right of way for the ditch through the Bernards property; and it is alleged that relying upon the agreement for the settlement of the controversy the plaintiff expended large sums of money with the knowledge of defendants and that therefore the defendants ought to be precluded from asserting that the plaintiff is not a legally organized drainage district.

The reply contains averments to the effect that Herman Bernards appeared and testified as a witness when the County Court heard the remonstrance of Hubert Bernards against the petition for the organization of the district; that he testified as a witness when the County Court heard the objections made by Hubert Bernards against the assessment; and that he was present and heard the negotiations that resulted in the settlement and dismissal of the condemnation action. The plaintiffs say in their reply that Herman Bernards never questioned the legality of the formation of the drainage district until the defendants filed their answer in this suit and that, therefore, he ought not to be permitted now to deny the existence of the plaintiff.

The reply also affirmatively avers that a copy of the petition was served upon Herman Bernards personally on September 4, 1914.

The trial court found from the evidence that the plaintiff was a legally organized drainage district; that "Herman Bernards was served with a copy of the petition and notice prior to the time set for the hearing of the organization of said drainage district"; that the ditch "will be of benefit to the" Bernards lands; and "that the amount of said assessment is not disproportionate to the benefits to be derived by said land." The court awarded the plaintiff a judgment against the Bernards lands for the amount of the assessment, costs and disbursements and rendered a decree ordering a sale of the property. The defendants appealed.

In brief, the defendants contend that: (1) Their land will not be benefited; (2) Sections 6126 to 6145, L. O. L., inclusive, as well as the amendatory statute found in Chapter 241, Laws 1911, are unconstitutional and so vague as to be unenforceable; (3) that jurisdiction to create the district was never acquired because of a failure to serve Herman Bernards with a copy of the petition; and (4) the legislation under which plaintiff attempted to establish and foreclose a lien was repealed by Chapter 340, Laws 1915, without any saving clause, and that it was again repealed by Chapter 415, Laws 1917.

1. The statute provides for notice of the intended organization of a drainage district. Notice is given by publication in a newspaper, by posting and by personal service. Hubert Bernards appeared pursuant to the notice and objected to the inclusion of his lands, claiming that his property would not be benefited. A hearing resulted in a decision adverse to his contention. The statute also requires notice to be given of the date fixed for reviewing and considering the assessments reported by the viewers and an opportunity is given

land owners to appear and object. The required notice was given and Hubert Bernards appeared and objected to the levying of an assessment upon his lands, asserting that his property would not be benefited, and that even though it might be benefited the amount of the assessment was disproportionate to the benefit. These objections were overruled. The County Court twice decided that the Bernards lands would be benefited and the Circuit Court took the same view. The evidence justified the Circuit Court in finding that the Bernards property would be benefited and that the amount of the assessment was not disproportionate to the benefits that will be received; and, moreover, in the absence of fraud the defendants cannot, in this suit, question the amount of the assessment: *Houck* v. *Roseburg,* 56 Or. 238, 244 (108 Pac. 186); 14 Cyc. 1064; 9 R. C. L. 659.

In their first printed brief the defendants contend that the statutes under which the drainage district was organized are unconstitutional because "there is no pretense in the statute that the property is to be taken for public use"; and in their reply brief the defendants argue that the legislation is void because "there is no requirement that the petition shall allege that the purpose for which the lands are to be taken is a public use."

Although neither the allegations in the petition nor the findings made by the court could impart validity to an unconstitutional statute, nevertheless, before examining the questioned enactments, attention will be directed to the petition and to the findings made by the County Court. The petition alleges:

"That most of said land above described is low, marshy land, and is subject to overflow during the rainy seasons of the year, and a large part of said land

cannot be cultivated or farmed at all for lack of drainage.

"That your petitioners herein desire to drain all of said tract of land for the public benefit, for the improvement of sanitary conditions and the health of the people residing in said district, for the improvement of agriculture, and for the purpose of preparing said land for cultivation, and for the prevention of the overflow of said land by flood water or any possible rise over the level of the subsurface water thereof.

"That a large part of the land situated in said proposed drainage district is in a valley, and is low, marshy land, upon which water stands the greater part of the year, and is not susceptible of cultivation unless drained, and large pools of stagnant water stand upon said land in the summer, rendering the neighborhood unsanitary and unhealthy, and that it is necessary for the protection of the health of a large number of residents living in said district above mentioned, and for the improvement of a large tract of land in said district, and for rendering it subject to cultivation, and for the removal of the flood water upon said land, that the proposed drainage district should be established, and the territory above mentioned be drained in such a manner that the ends and purposes just mentioned will be attained."

After hearing the evidence the County Court found that the existing conditions were as alleged by the petitioners.

2, 3. Drainage for the benefit of the public health is for a public use and drainage for the reclamation of large tracts of swampy lands for agricultural purposes is likewise generally considered to be for the public benefit, and consequently we must conclude that the petition sufficiently alleged, and the County Court expressly found, that the proposed ditch would be for a public use: *Seely* v. *Sebastian*, 4 Or. 25. 30; *Mittman* v. *Farmer*, 162 Iowa, 364 (142 N. W. 991, Ann. Cas.

1915C, 1); *Billings Sugar Co.* v. *Fish,* 40 Mont. 256 (106 Pac. 565, 20 Ann. Cas. 264, 26 L. R. A. (N. S.) 973); 9 R. C. L. 625, 626.

4–6. Sections 6126 to 6145, L. O. L., inclusive, except, however, Sections 6133 and 6134, were originally adopted in 1889 as parts of an act entitled "An act to promote drainage for agricultural and sanitary purposes": Laws 1889, p. 25. Section 6126, as amended by Chapter 241, Laws 1911, states that whenever 25 per cent of the owners "desire to drain the same for the public benefit for sanitary purposes for the improvement, * * " they may present a petition for the organization of a drainage district. The same section requires the petition to state "the necessity for such drainage." By the express terms of Section 6128, L. O. L., as amended by Chapter 241, Laws 1911, the petition cannot be approved unless "the court find that the district is of public utility and importance, and that the benefits to be derived from the proposed drainage will exceed the cost thereof. * * " Thus it is seen that in its title the statute makes avowal of its public purpose; that the privilege of filing a petition is offered only to those owners who desire to drain lands "for the public benefit"; that the petition must state "the necessity for such drainage"; and that the court must "find that the district is of public utility and importance." Obviously "the necessity" which must appear in the petition refers to the public necessity. Of course the statute cannot be sustained if it is designed to take private property for a private purpose. It has been held in a well-considered case, and upon reasoning which seems to be unanswerable, that it is not necessary that a drainage act should specifically state that the enactment is for a public purpose, but it is sufficient if, from all the provisions of

the statute, it reasonably appears that it is for that purpose: *State* v. *Board of Commrs. of Polk County,* 87 Minn. 325 (92 N. W. 216, 60 L. R. A. 161). To the same effect are: *Laguna Drainage Dist.* v. *Charles Martin Co.,* 144 Cal. 209, 214 (77 Pac. 933), and *Brown* v. *Keener,* 74 N. C. 714. The statute under consideration does not attempt to authorize the taking of private property for private purposes but in plain and unequivocal language its operation is confined to public uses. The contention that the statute does not require the petition to allege that the district is to be for a public purpose and that the legislation is on that account unconstitutional is answered by Section 6126, L. O. L., as amended by chapter 241, Laws 1911, where it is required that the petition shall state "the necessity for such drainage"; and this requirement to allege "the necessity of such drainage" is fully satisfied by the allegations found in the petition: *Corey* v. *Swagger,* 74 Ind. 211, 213. However, the statute would not necessarily be unconstitutional, even though it did not in terms require the petition to allege that the proposed drainage district was a public necessity: *Kinnie* v. *Bare,* 80 Mich. 345 (45 N. W. 345); 14 Cyc. 1032; 9 R. C. L. 635.

Invoking the doctrine announced and applied in *Leffingwell* v. *Lane County,* 64 Or. 144 (129 Pac. 538), the defendants contend that Section 6126, L. O. L., as amended by Chapter 241, Laws 1911, is so vague and uncertain as to be unenforceable. Section 6126, L. O. L., is the opening section of the chapter providing for the organization of drainage districts, and after stating when a petition may be filed and specifying what the petition should contain, the statute, as amended by Chapter 241, Laws 1911, requires that the petition

"must be published for four weeks preceding the date designated in the petition for the hearing thereof in some newspaper published in each county in which the lands included in said district are situate, and must be posted for the same length of time on bulletin-board in the county courthouse of each such county; and a copy thereof shall be served on each record owner and person in possession of such lands if to be found within the county or counties in which such proposed drainage district may be located."

It will be observed that the statute requires the notice: (1) to be published for four weeks in a newspaper; (2) to be posted for four weeks on a bulletin-board in the courthouse; and (3) to be served on each record owner and occupant of the lands within the proposed district. The argument of the defendants is that the statute is indefinite and uncertain because: (a) it does not provide whether proof of service on each record owner and occupant shall be made prior or subsequent to the meeting of the County Court; (b) it does not provide for how long a time the notice shall be personally served or given; and (c) it does not provide a method of proving that notice has been given.

7, 8. It must be borne in mind that Section 6126, as amended, relates only to the formation of a drainage district and that it does not involve the taking of private property; and hence, the statute would be valid, even though it made no provision at all for notice of the proposed formation of a drainage district: *Paulsen* v. *City of Portland,* 149 U. S. 30, 40 (37 L. Ed. 637, 13 Sup. Ct. Rep. 750); *Ross* v. *Board of Supervisors,* 128 Iowa, 427 (104 N. W. 506, 1 L. R. A. (N. S.) 431); *Spencer* v. *Merchant,* 125 U. S. 345, 355 (31 L. Ed. 763, 8 Sup. Ct. Rep. 921); *Phipps* v. *Medford,* 81 Or. 119, 124 (156 Pac. 787, 158 Pac. 666). But if it be assumed

that the "due process of law" clause of the Constitution requires notice so that the owner would be afforded an opportunity to be heard it probably would not be claimed and it certainly could not be successfully contended that the formation of a drainage district requires any more notice than would be requisite or a form of notice different from that which would be sufficient to validate the laying of an assessment upon property benefited by an improvement. It is true that a special assessment cannot be imposed upon property unless notice be given and the owner afforded an opportunity to be heard at some stage of the proceedings; but it is also true that the nature of the proceeding is such that personal service of notice is not required and consequently notice by publication in the newspaper or by posting is sufficient to satisfy the command of the Constitution: *Paulsen* v. *Portland,* 149 U. S. 30, 40 (37 L. Ed. 637, 13 Sup. Ct. Rep. 750); *Swain* v. *Fulmer,* 135 Ind. 8, 12; *Carr* v. *State,* 103 Ind. 548 (3 N. E. 375); *Klein* v. *Tuhey,* 13 Ind. App. 74, 76 (40 N. E. 144); *Hennessy* v. *Douglas County,* 99 Wis. 129, 153 (74 N. W. 983); *Lent* v. *Tillson,* 140 U. S. 316 (35 L. Ed. 419, 11 Sup. Ct. Rep. 825); 6 R. C. L. 450; 28 Cyc. 983. In other words, Section 6126, as amended, would be valid even though it did not require any notice whatever; and even though it be assumed that notice is necessary it would nevertheless be valid if it only provided for notice by publication and posting.

9. That part of the statute which speaks of personal service of the petition upon the record owners and occupants does not fix the time for service. The enactment merely requires personal service and does not specify any time when service must be made. For the purposes of this case, it may be assumed, but it

is not decided, that the clause which directs personal service of the petition is too vague and uncertain to be enforceable. The assumption that the clause relating to personal service of the petition is invalid does not necessarily compel the conclusion that the whole statute is invalid, for it may be that the invalid part may be pruned out so as to leave the remainder a valid and enforceable statute. If the general scope and purpose of the legislation under consideration are constitutional and constitutional means are provided for effecting the general purpose of the legislation the entire statute will not be declared void because one or more of the details, or minor provisions, or incidental clauses are not in accordance with the Constitution; provided, the invalid part may be eliminated without materially affecting the general purpose: *Lowery* v. *School Trustees,* 140 N. C. 33 (52 S. E. 267); *State* v. *Kelsey,* 44 N. J. L. 1. In 26 Am. & Eng. Ency. of Law (2 ed.), 570, the rule is stated thus:

"Where the provisions are so interdependent that one may not operate without the other, or so related in substance and object that it is impossible to suppose that the legislature would have passed the one without the other, the whole must fail; but if, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, it must be sustained."

When the clause relating to personal service is stricken out, that which remains still provides for notice to the owners and occupants of the lands, is complete in itself and capable of being executed in accordance with the apparent legislative intent; and therefore the assumed invalid part does not affect or impair the remainder of the legislation.

The defendants contend that Section 6136, L. O. L., as amended by Chapter 241, Laws 1911, is also open to the objection that it is too vague and uncertain to be enforceable. After empowering the County Court to appoint viewers to view the lands and make an assessment of the benefits to be derived from an improvement, Section 6136, as amended, continues by directing the viewers to report the assessment made by them to the County Court which shall review and consider the assessment at a subsequent term to be fixed by its order, "and of which notice shall be given by posting the same on the bulletin-board in the county courthouse in each county embraced in the district, and in such other manner as the County Court may prescribe." In the instant case, the County Court fixed October 9, 1914, as the time for reviewing the report of the viewers and directed the county clerk to give notice of the hearing by posting a notice on the bulletin-board in the courthouse and at three places in the drainage district for a period of not less than ten days prior to the hearing and by mailing a notice to each owner at least ten days before the hearing. The county clerk executed the order of the County Court and gave the notice by posting on the bulletin-board in the courthouse and by posting at three places in the drainage district and by mailing a notice to each owner, including Hubert Bernards. Moreover, Hubert Bernards appeared pursuant to the notice and contested the assessment. It will be noted that Section 6136, as amended, provides that notice shall be given: (1) by posting on the bulletin-board in the courthouse; and (2) in such other manner as the County Court may prescribe. The defendants argue that all that portion of the section which speaks of posting on the bulletin-board is invalid because it does

not prescribe the period of posting, or when the notice is to be posted, or what proof is to be made of posting or how proof is to be preserved.

10, 11. It must be conceded that an assessment could not be charged against the Bernards property unless notice was given; but it must also be conceded that personal service of notice was not essential since, because of the nature of the proceeding, it is sufficient if notice is given by posting and publication or by either posting or publication; and therefore if the statute had gone no further than merely to direct that notice should be given in such manner as the County Court may prescribe the constitutional requirement of "due process of law" would have been satisfied. Nor would such a statute amount to a delegation of legislative power to the judiciary: *State* v. *Adams Express Co.*, 66 Minn. 271 (68 N. W. 1085, 38 L. R. A. 225); 12 C. J. 855. It may be assumed then, but it is not decided, that all that part of Section 6136, as amended, which provides for posting on the bulletin-board is too indefinite and uncertain to be enforced. This assumption of the partial invalidity of Section 6136, as amended, results in a situation like the one presented by Section 6126, as amended. Testing Section 6136, as amended, by the rule applied to Section 6126, as amended, it will be seen that the elimination of the uncertain portion of the statute leaves a valid remainder which is complete in itself and is capable of being executed in accordance with the apparent legislative intent. The County Court exercised the power conferred upon it and directed that notice be given not only by posting in the courthouse but also by posting in the drainage district and by mailing to the owners; and, moreover, Hubert Bernards, who was the fee-simple owner of the premises, actually

appeared in response to the notice and contested the assessment.

12–14. The validity of the drainage legislation under consideration is not affected by reason of the fact that Section 6126, L. O. L., as amended, does not provide for proof of service of notice nor is the statute impaired on account of the failure of Section 6136, as amended, expressly to require proof of service of notice. It may be conceded that the district could not have been legally formed unless the notice prescribed by the statute was actually given; and it may also be admitted that a valid assessment could not have been made unless the notice required by the statute was given. The giving of notice is the essential element and is the ultimate fact upon which the jurisdiction of the County Court is dependent; and since the statute does not provide for the manner in which that fact may be made to appear the proofs actually submitted to the County Court were adequate and sufficient for the purpose. Quite a different situation would be presented if the statute expressly provided for the mode of proof and there had been a failure to comply with the statutory requirement; and a different case would also be presented if the proceeding were one which the parties were entitled to have tried in a court. Before adjudging the formation of the district, proof of service of the notice was made and filed with the County Court and that tribunal expressly found from the returns made by the several sheriffs that all the record owners and occupants of lands included within the proposed district had been personally served with a copy of the petition. In other words, the important questions are: Was the required notice really given? Was Herman Bernards actually served? It is conceded that notice was posted and

published as required by Section 6126, as amended, and while the defendants insist that Herman Bernards was not personally served, they concede that notice was personally served on all other owners and occupants. The circuit judge found that the notice was in truth served upon Herman Bernards and while the evidence is conflicting, we approve the finding of the circuit judge because he had the advantage of seeing and hearing the witnesses. Since the fact of service of notice actually existed it was competent in the Circuit Court to supplement the proof of service, submitted to the County Court and the finding made by that tribunal, with the parol testimony of O. E. Quick, the deputy sheriff who claims to have served the notice on Herman Bernards. In *Clinton* v. *City of Portland,* 26 Or. 410, 418 (38 Pac. 407), this court, speaking through Mr. Justice MOORE in an analogous case, held that

"parol evidence to show facts omitted to be stated upon the record is admissible, unless the law expressly requires them to be in writing, and makes the record the only evidence. * * This degree of proof not being required by the charter, every fact necessary to prove the publication of the notice could be and was established by extrinsic evidence."

Our conclusion is that the statute is valid and that the proceedings were regular. This conclusion disposes of the contentions made by the defendants concerning the failure of the statute to provide for the manner or the form of the service as well as the contentions of the defendants relating to the amendment of the return so as to show service on Herman Bernards. In addition to *Clinton* v. *City of Portland,* 26 Or. 410 (38 Pac. 407), our conclusion upon the subject of proof of service is supported by the following authorities: Hamilton on Special Assessments, § 371;

Rue v. *Chicago,* 66 Ill. 256; *Lingle* v. *Chicago,* 172 Ill. 170 (50 N. E. 192); *City of Seattle* v. *Doran,* 5 Wash. 482 (32 Pac. 105, 1002); *State* v. *Several Parcels of Land,* 76 Neb. 320 (107 N. W. 566); *Larson* v. *People,* 170 Ill. 93 (48 N. E. 443); *Shimmons* v. *City of Saginaw,* 104 Mich. 511 (62 N. W. 725); *Chung Yow* v. *Hop Chong,* 11 Or. 220, 221 (4 Pac. 326); *Smith* v. *Jefferson,* 75 Or. 179, 193 (146 Pac. 809). See. also, *Russell* v. *Durham,* 16 Ky. Law Rep. 516 (29 S. W. 16).

In 1915 the legislature enacted a new statute, relating to drainage districts: Chapter 340, Laws 1915. In *State* v. *Nyssa-Arcadia Drainage Dist.,* 80 Or. 524, 526 (157 Pac. 804), this new statute was held to be a substitute for prior legislation upon the subject and it was therefore decided that by implication Chapter 340, Laws 1915, repealed the previous statutes. Section 6131, L. O. L., was expressly repealed by Chapter 241, Laws 1911, and the remainder of the chapter on drainage districts, being Sections 6126 to 6145, L. O. L., inclusive, was expressly repealed by Chapter 415, Laws 1917. In brief, all the legislation upon the subject of drainage as codified in Sections 6126 to 6145, L. O. L., and as amended by Chapter 241, Laws 1911, was repealed (a) by implication by Chapter 340, Laws 1915; and (b) by the express terms of Chapter 415, Laws 1917. The defendants contend that the statutes of 1915 and 1917 operate to prevent the plaintiff from enforcing payment of the assessment levied upon the Bernards lands. All the assessment proceedings were completed before the act of 1915 became effective. The assessment was made by the viewers, equalized and approved by the County Court, and placed upon an assessment-roll and in the language of Section 6136, L. O. L., as amended by Chapter 241, Laws of 1911:

"Thereupon such assessment shall become a lien upon the lands therein described, and shall be collected in like manner as general taxes are collected, or by civil suit or action, as the County Court may direct."

Section 6136, as amended, permits an owner to pay an assessment in a lump sum or to make application under the Bancroft Bonding Act to pay in annual installments. On February 25, 1915, the county treasurer made a report showing that the time for paying assessments, or making application under the Bancroft Bonding Act, expired on February 23, 1915; that up to February 23, 1915, Hubert Bernards and two others had permitted the assessments charged against their respective lands to become delinquent; that fifteen owners had paid in full and that all the remaining owners had made application under the Bancroft Bonding Act for the right to pay in annual installments.

Pursuant to an order made by the County Court this suit was commenced by the filing of a complaint on July 10, 1915. A trial was had in the Circuit Court and on June 5, 1916, resulted in a judgment and decree for the plaintiff. Chapter 415, Laws 1917, did not become effective until May 20, 1917: *Cooper* v. *Fox,* 87 Or. 657 (171 Pac. 408).

15, 16. Chapter 340, Laws of 1915, does not contain a saving clause. While it is true that the statute of 1915 is a substitute for prior legislation, nevertheless it is apparent that the legislature intended that the new statute should operate prospectively and not retrospectively. It is not necessary to analyze the act of 1915, but it is sufficient to say that an examination of the statute will make it plain that the legislature only intended the new statute to operate in the future. The act of 1915 speaks of the future rather than of the past when it provides a plan for the organization of drainage

districts and a scheme for levying and collecting a tax for improvements. A change of statute will ordinarily be construed, if practicable, as having a prospective operation only, and as applying solely to subsequent improvements; or as stated in 1 Page and Jones on Taxation by Assessment, Section 263,

"a change of statute which does not apply in express terms or by necessary implication to pending proceedings will not be regarded as applying thereto."

17. The applications which most of the owners signed under the Bancroft Bonding Act resulted in contracts imposing obligations which bind both parties and which cannot be impaired by subsequent legislation: *Colby* v. *Medford,* 85 Or. 485 (167 Pac. 487). To hold with the defendants is to hold that by the act of 1915 the legislature intended to remit all delinquent drainage assessments not brought within the provisions of the Bancroft Bonding Act and that the legislature did not, because it could not, remit, interfere with or affect any unpaid assessments brought within the embrace of the Bancroft Bonding Act. Such a result must be expressed in clear and unequivocal language before a court would be warranted in giving this statute a retrospective operation: *Smith* v. *Kelly,* 24 Or. 464, 473 (33 Pac. 642); *Wist* v. *Grand Lodge A. O. U. W.,* 22 Or. 271, 283 (29 Pac. 610, 29 Am. St. Rep. 603); *Oakland* v. *Whipple,* 44 Cal. 303; *Pennsylvania Co.* v. *Cole,* 132 Fed. 668; *Garrick* v. *Chamberlain,* 97 Ill. 620; 2 Page and Jones on Taxation by Assessment, § 1113.

18. Chapter 415, Laws of 1917, is a pure repealing statute, for its operation is confined to a repeal of the legislation which prevailed prior to the act of 1915. By the act of 1917 the legislature only accomplished by a statute what the court had already accomplished by a judicial decision. The manifest purpose of the act of

1917 was to make it clear that after the act of 1915 became effective drainage districts could not be organized or assessment proceedings commenced under Sections 6126 to 6145, L. O. L., as amended in 1911, but that drainage districts must be organized and assessment proceedings commenced under the statute of 1915. If the act of 1917 had repealed all legislation upon the subject of drainage districts then a different problem would be presented. The distinction between a statute which entirely withdraws jurisdiction over the subject matter of a repealed statute and one which merely changes the form of procedure is exemplified in *The Hickory Tree Road*, 43 Pa. St. 139. The act of 1915 simply provided a new procedure in the County Court for the organization of drainage districts and a new plan for paying for improvements; and since the act of 1917 did not abolish all procedure for organizing drainage districts and did not repeal all plans for making improvements and assessments and did not attempt to remove drainage districts from the jurisdiction of the County Court, this statute must be construed in connection with the act of 1915 and interpreted as though it were a part of the act of 1915. In other words, the act of 1917 does not produce a result different from that which would be produced if the act of 1915 had contained a section expressly repealing all prior drainage legislation. The general rule is that the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions pending under it at the time of its repeal: 36 Cyc. 1228; *State* v. *Ju Nun*, 53 Or. 1 (97 Pac. 96, 98 Pac. 513). But to this general rule there are exceptions. One of the exceptions is tersely stated in 36 Cyc. 1229, thus:

"Where the repealing act relates merely to matters of procedure and substitutes new forms or methods

in place of the old, the action does not abate, nor is the validity of proceedings already taken affected; further proceedings in such a case are had, so far as possible, under the new law, and where it does not apply are conducted in accordance with the old."

Apt illustrations of the quoted rule are found in the following precedents: *Newsom* v. *Greenwood,* 4 Or. 120–122; *Danforth* v. *Smith,* 23 Vt. 247; *Pittsburgh etc. R. Co.* v. *Oglesby,* 165 Ind. 542 (76 N. E. 165); *Knoup* v. *Piqua Branch of State Bank,* 1 Ohio St. 603. As stated in *Uwchlan Township Road,* 30 Pa. St. 156, 158,

"we cannot presume that the legislature, by changing the forms of proceedings, intend to strike down or forbid any further progress in one already commenced."

The act of 1915 did not preclude the Circuit Court from rendering the judgment and decree entered in June, 1916; nor does the statute of 1917 prevent this court from affirming that judgment and decree.

The judgment and decree appealed from are affirmed.

AFFIRMED.

HARRIS, J., sat for MCCAMANT, J.

Argued July 9, modified September 17, 1918.

BERNITT *v.* CITY OF MARSHFIELD.*

(174 Pac. 1153.)

Evidence—Parol—Plat—Ambiguity.

1. Parol evidence, though inadmissible to change a plat of a city or town made by the owner of the property, in a collateral suit, is competent, under Section 713, L. O. L., to explain an ambiguity in the plat.

*On effect of improvements by abutting owner with reference to what is erroneously supposed to be the street boundary line to estop the municipality from asserting the true line, see note in 7 L. R. A. (N. S.) 243. REPORTER.

Evidence—Parol—Plat—Survey.

2. Parol evidence is competent to show survey of lines delineated on a map by dotted red lines.

Evidence—Parol—Survey.

3. Evidence of where a survey actually ran is always competent, for purpose of showing lines and boundaries.

Boundaries—Maps—Surveys.

4. If a map or plat does not agree with survey of the same as laid upon the ground at time of making map or plat, the survey must prevail in establishing the correct boundary of a lot or street, if position of points and lines established by survey can be proved.

Boundaries—Evidence—Fences—Street Improvements.

5. In construing, interpreting, or resurveying an old map or plat, old fences, street improvements, lines of occupancy, etc., showing that the territory had for a long time been occupied under an evident and consistent survey of such plat, are strong evidence of location of original lines.

Boundaries—Plat Copied from Another Plat—Survey.

6. When a plat is copied from another map, it is proper to consult the latter, and the survey made thereunder, to locate the boundaries.

[As to admissibility of ancient maps in evidence, see note in Ann. Cas. 1916C, 176.]

Constitutional Law—Surveys—Vested Property Rights.

7. Where property is surveyed and platted, property rights vesting under such plat cannot be changed by a subsequent survey ordered by city.

Municipal Corporations—Ordinances—Vacating Street—Dedication of Part of Street.

8. An ordinance attempting to vacate 10 feet on both sides of a street, and to dedicate such land to adjoining land owners, was merely revocable permit to prepare portion of street as a kind of parking, where city had no authority to vacate street or dedicate portion thereof, and where it had retained dominion over the narrow tract by preventing erection of structure thereon, except fence.

Municipal Corporations—Attempted Dedication of Part of Street—Estoppel.

9. Where ordinance attempted to vacate 10 feet on both sides of a street, and to dedicate such land to adjoining land owners, and prescribed use to be made thereof by owners, but ordinance was unauthorized by its charter, and was mere permit, the improvement of the land by owners did not estop city from claiming land; such improvement being as directed by the ordinance, and not antagonistic to city.

From Coos: GEORGE F. SKIPWORTH, Judge.

Department 2.

This is an appeal by defendants from a decree of the trial court enjoining the officials of the defendant city

from improving and grading approximately 609.8 feet of First Street North, formerly known as Pine Street. On July 12, 1915, the common council of the city of Marshfield declared its intention to improve said street according to plans then adopted, sixty feet in width and to grade down same approximately twenty feet, the proposed improvement to extend from the north line of Market to the south line of Alder Street, according to the Clement plat.

In 1854, one Wilkins Warwick made an entry under the Donation Act upon 160 acres of land, including what is now known as the Clement Plat. The Warwick entry and right to patent were contested by the inhabitants of Marshfield, who claimed the land under the town-site act, but the decision of the United States land office in 1876, was in favor of Warwick, and patent issued to him. In 1874, the town of Marshfield was incorporated, and the authorities thereof in 1875, during the pendency of the litigation, caused a plat to be prepared by S. B. Cathcart of a portion of the Warwick claim, referred to in the testimony as the Cathcart plat. It was never recorded in the county records, but was accepted by the city and kept in the office of the city recorder. In 1883, J. N. Knowles, who had succeeded to the Warwick title, through his attorney in fact, E. B. Clement, platted the same land as that covered by the Cathcart plat. This plat was duly recorded in the office of the county clerk of Coos County, and is known as the Clement plat, in which the streets, alleys, lots and blocks were named and numbered the same size and width as in the Cathcart plat, but in the latter plat the directions of the streets were north one degree east, while in the Clement plat they are claimed to be due north, and this difference, plus the attempted vacation of ten feet in width in

front of plaintiffs' respective tracts, under what is known as Ordinance No. 74 of the town of Marshfield, enacted February 11, 1886, gives rise to the present litigation.

The street in controversy is a short residence street in the old part of the City of Marshfield; upon this street were built the first residences of Marshfield, many of which are still standing. The street and adjoining lots are on a plateau which is from fifteen to twenty feet higher than the business part of the city.

MODIFIED.

For appellants there was a brief over the names of *Mr. Bennett Swanton, Mr. J. T. Brand* and *Mr. T. T. Bennett,* with an oral argument by *Mr. Swanton.*

For respondents there was a brief over the name of *Messrs. Peck & Peck,* with an oral argument by *Mr. Arthur K. Peck.*

BEAN, J.—Aside from the legal questions involved, the plaintiffs claim that the improvement is unjustified and will destroy the street for residence purposes; also, that the expense of the improvement would nearly confiscate the adjoining lots. The plaintiffs claim that the Clement and Cathcart plats are identical and that the street is laid upon the ground in accordance therewith.

The defendants claim that the Clement plat differs from the Cathcart plat in the location of the North and South Street lines, claiming that under the Clement plat the street lines run due north and south while under the Cathcart plat and Hall plat, made prior to 1875, they ran north one degree east.

In 1905, one Polley made a survey of the street under the direction of the city council according to their con-

struction of the Clement plat, making the north and south lines of the street run north one degree to the west of the street lines as laid out on the ground. The city proposes to improve this street according to the lines of the Clement plat as surveyed by Polley.

Plaintiffs, over the objections of defendants, introduced testimony showing that the Clement plat was made by an architect who copied a portion of the Cathcart plat. There was not a complete survey made on the ground at the time the Clement plat was prepared. At that time John Hall, a surveyor, at the instigation of the owner of the property, laid off the lines of Pine and some other streets showing the frontage and fence lines of the lot owners. He took the base line of the Cathcart plat as the same was then established in the center of Pine Street and surveyed the lines of the street a distance of 30 feet on either side of such base line, and parallel thereto. Along these street lines he drove stakes or pegs. This information was furnished the draftsman of the Clement plat and incorporated therein, the exterior lines of the street and front lines of the lots being marked thereon by a red dotted line. There are no other bearings or field-notes on the Clement plat. The only other directions being the designation of the points of the compass; the top of the map representing north. Apparently the lines of First Street, or Pine Street, as it was then called, run north and south, or nearly so. There is an iron pipe set in the ground at the south end of the center line of Pine Street. This is shown on the Clement plat. This point is not in dispute. The testimony shows that formerly there was such a pipe set at the north end of this line as surveyed by Cathcart and Hall. The improvements on Pine Street, such as buildings, fences and sidewalks, have

been made to substantially conform to the Cathcart survey since about 1875.

By running the lines of the street due north, according to the Polley survey, they diverge to the west of the Cathcart line about two and four-tenths feet to each 100 feet as demonstrated by the survey of Mr. A. B. Gidley, a civil engineer, and the west line of the street would intersect several dwelling-houses situated on the lots of plaintiffs. Some of these houses have been occupied where they now stand since the seventies and eighties, having been remodeled and improved.

The reason of the objection of the defendants to the evidence of the Cathcart survey and plat is that parol evidence is not admissible to change a plat of a city or town, made by the owner of the property, in a collateral suit. This rule is unquestioned, but the Clement plat taken by itself is somewhat ambiguous. It is impossible to tell with the naked eye whether or not the lines of this street run exactly north and south.

1, 2. Oral evidence of the circumstances under which a writing has been made, or to explain an ambiguity, either intrinsic or extrinsic, is competent: Section 713, L. O. L., and notes.

It was peculiarly appropriate to explain the Clement plat by oral evidence. Such evidence did not change that instrument. It was also competent to show the survey of the lines of Pine Street by John Hall, which were delineated on the Clement map by red lines. It is clearly shown by the evidence that in making the Clement plat, a part of the Cathcart plat was adopted. The Cathcart survey, in so far as the same related to the land embraced in the Clement plat, was for all practical purposes also adopted. No other complete survey of the land was made. The portion surveyed by Mr. Hall conformed to the Cathcart survey, and

the dotted red lines on the Clement plat representing the exterior lines of Pine Street served as monuments representing the street lines upon the Clement map.

3–6. A surveyor must have data from which to make a survey, and cannot determine lines and fix monuments according to his own ideas. For the purpose of showing lines and boundaries, it can always be proven where the survey actually ran. If a map does not agree with the survey of the same as laid upon the ground at the time of making the map or plat, then the survey must prevail in establishing the correct boundary of a lot or street if the position of the points and lines established by the survey can be proved: 2 Devlin on Deeds (3 ed.), §§ 1020 and 1020a; *O'Farrel* v. *Harney,* 51 Cal. 125. In construing, interpreting or resurveying an old map or plat, old fences, street improvements, lines of occupancy, etc., showing that the territory had for a long time been occupied under an evident and consistent survey of such plat, are strong evidence of the location of the original lines: *Beaubien* v. *Kellogg,* 69 Mich. 333. When a plat is copied from another map, it is proper to consult the latter and the survey made thereunder, to locate the boundaries of the former: *McLane* v. *Grice* (Tex. Civ. App.), 66 S. W. 709.

7. The action of the city council of Marshfield in causing a survey by Polley in 1905 cannot change the property rights of the plaintiffs as they have vested under the original Clement plat as it was laid out upon the ground by John Hall, the surveyor: *Sheridan* v. *Empire City,* 45 Or. 296, 300 (77 Pac. 393).

We concur in the finding of the trial court that the lines of First Street North, as surveyed by Cathcart and Hall, are the true boundaries of the street, as represented upon the Clement map.

First Street, or Pine Street, was originally dedicated sixty feet in width. In February, 1886, the board of trustees of the town (now city) of Marshfield passed Ordinance No. 74, providing for the improvement of a portion of Pine Street. By Section 9 of this Ordinance, it was declared as follows:

"That the ten (10) feet in breadth on the East and West sides of said Pine Street and not included in the forty feet heretofore mentioned be and the same is hereby vacated for the purpose of improving the appearance and breadth of said street and that the said ten (10) feet be and the same is hereby dedicated other adjoining lot owners. * * Provided, and such vacation and dedication is made with the distinct provision that no buildings shall be erected, moved on to or permitted to remain on any portion of said strip of ten feet and that nothing in the shape of a structure save and excepting a fence, not to exceed in height 4½ feet shall be built thereon. And it is further provided that should any of the adjoining lot owners permit or allow any of the provisions aforesaid to be broken or in any way violated the said strip of ten (10) feet fronting his said lot shall immediately revert to and vest in said town as though the vacation and dedication therein had not been made, during the continuance of such violation and this section is enacted subject specially to the provisions and restrictions aforesaid."

8. Afterward the adjacent lot owners moved their fences so as to embrace the 10-foot strip and planted lawns and shrubbery thereon. Defendants contend that the action of the city officials as to the vacation of the 10-foot strip was void. The first charter of Marshfield enacted by the legislature in 1874 authorized the board of trustees to "lay out and open streets." No authority was given by the charter to vacate a street. Amendments to the charter were made by the lawmakers of the state in 1876 and 1880, but no power

was conferred upon the board of trustees to vacate a street, or dedicate a portion of such a highway to adjoining lot owners. Moreover from the language of the ordinance quoted above, it appears to have been the real intention of the municipal officials to permit a restricted use of the 10-foot strip in question by the adjacent property owners, or to ordain, what they seemed to have termed, a temporary vacation. It does not appear by the language used that it was the purpose of the city authorities to relinquish the right to the control over that portion of the street. Ever since the passage of Ordinance No. 74, the property owners adjoining that part of the street affected, by their occupancy of the 10-foot strip have necessarily recognized, and acquiesced in, the right of the city to prevent the erection of any building or other structure thereon except a fence. In this way the municipality has held dominion over the narrow tract for street purposes during that time. The effect of Ordinance No. 74 was no more than a revocable permit to prepare a portion of the street as a kind of parking. In 1903, the city council of the City of Marshfield after ordering a certain structure removed from a street declared that the pretended vacation of the strip was null and void, and revoked the same, and ordered the sidewalks to be removed to the outer line of the street. It does not appear that the 10-foot strip on each side of Pine Street was ever legally vacated. The trial court held that the city was restricted to the improvement of the street as only 40 feet in width.

The contention of the plaintiffs is that the city is equitably estopped from asserting a right to the 10-foot strip as a street by reason of its laches. The rule in regard to laches in a matter of this nature is

stated by Mr. Chief Justice BEAN in *Oliver* v. *Synhorst*, 48 Or. 292, at page 297 (86 Pac. 376, at page 378, 7 L. R. A. (N. S.) 243), as follows:

"But, while the rule may be that the ordinary statute of limitations as such cannot be set up to defeat the right of the public to the use of a street or highway, there may grow up, in consequence of the laches of the public authorities, private rights of more persuasive force in the particular case than that of the public, and if 'acts are done by an adjoining proprietor which indicate that he is in good faith claiming as his own that which is, in fact, a part of the highway, and is expending money on the faith of his claim, by adjusting his property to the highway as he supposes or claims it to be, the public will be estopped' ": Citing authorities.

9. The plaintiffs invoke this rule, but the facts in the present case do not bring it within such announcement. The rule in regard to laches in such cases is somewhat analogous to that prescribed by the statute of limitations. The use of the street in question by the adjoining property owners was made as directed by the ordinance of the city. It was not antagonistic to the municipal rights. The improvements were made with the permission of the city, therefore the rule does not apply. The recognition of the dominion by the city government over the part of the street by the adjacent lot owners does not indicate that such property owners were claiming that part of the street as their own property, but showed the reverse. The expenditure made in adorning the "parking" or side of the street, with grass and shrubbery was in consonance with the provisions of Ordinance No. 74.

We hold that First Street North, formerly Pine Street, is 60 feet in width. With the modification as to the width of the street as specified, the decree of the

lower court should be affirmed. Plaintiffs are entitled to recover their costs in this court. It is so ordered.

MODIFIED.

McBRIDE, C. J., and BENSON and JOHNS, JJ., concur.

Argued July 2, reversed and dismissed September 17, 1918.

COLBY *v.* CITY OF PORTLAND.

(174 Pac. 1159.)

Municipal Corporations — Sidewalks — Personal Injuries — Presenting Claims—"Claim for Damages."

1. Portland City Charter, Section 282, providing that "claims for damages" against the city must be presented to the auditor within six months after accrual, does not include claims arising *ex delicto* for personal injuries from defective sidewalks, from which liability Section 281 attempts to exempt the city.

Limitation of Actions—Computing Time—Statutory Prohibitions.

2. Under Section 8, L. O. L., an action against a city for personal injuries caused by a defective sidewalk must be brought within two years after it accrued, and the provision of Section 20 that the period of a statutory prohibition shall be no part of the time limited is not made applicable in such a case by Portland City Charter, Section 282, providing for audit of claims, but not including claims arising *ex delicto.*

Limitation of Actions—New Action After Reversal of Judgment for Plaintiff.

3. Under Section 21, L. O. L., providing that, when an action begun within the statute of limitations results in judgment for plaintiff, the latter may bring a new suit thereon within one year after reversal thereof on appeal, does not, in view of Section 184, apply to an action against a city and its officers, where plaintiffs' judgment against the officers was reversed more than a year after dismissal of the action against the city.

Limitation of Actions—Action Against Servant.

4. Running of statute of limitations is not interrupted by commencement of action against servant of real party in interest.

[As to whether the disability of one person, in respect to the statute of limitations, may inure to the benefit of another, see note in 49 **Am. St. Rep.** 710.]

From Multnomah: ROBERT TUCKER, Judge.

In Banc.

This is an action of negligence against the City of Portland brought by Victoria I. Colby for personal injuries alleged to have been received on the sixth day of May, 1915, as the result of a fall on a cross-walk at the intersection of East Salmon and East Thirty-second Streets in the City of Portland. The case was tried before the court and a jury, resulting in a verdict for the plaintiff in the sum of $1,578.50. The facts involved were before this court in the case of *Colby* v. *City of Portland,* 80 Or. 359 (166 Pac. 537), decided July 3, 1917. In that case, the trial of the lower court resulted in an alleged order of nonsuit as against the City of Portland, and a judgment against the other defendants who were officers of the municipality. Upon the reversal by this court of the judgment then obtained by the plaintiff against the city officers, this action was brought against the City of Portland alone. REVERSED AND DISMISSED.

For appellant there was a brief over the names of *Mr. Walter P. La Roche,* City Attorney, and *Mr. Stanley Myers,* Deputy City Attorney, with an oral argument by *Mr. La Roche.*

For respondent there was a brief over the names of *Messrs. Cleeton & McMenamin* and *Mr. Harold V. Newlin,* with an oral argument by *Mr. Thomas J. Cleeton.*

BEAN, J.—1, 2. The first question for consideration is raised by the demurrer to plaintiff's complaint, interposed by the defendant upon the ground that it appears upon the face thereof that the action was not commenced within the time limited by the Code, and

is barred. The trial court sustained the complaint and overruled the demurrer.

The complaint shows that the alleged injury occurred on May 6, 1915; that on June 1, 1915, plaintiff filed a claim for damages against the City of Portland with the city auditor; that on July 6, 1915, the claim was presented to the council of the city; and that on July 7th of that year her claim was rejected and disallowed by the council. The record shows that the complaint was filed July 25, 1917. Section 8, L. O. L., provides that an action for any injury to the person or rights of another not arising on contract and not herein especially enumerated shall be commenced within two years after the cause of action shall have accrued.

Counsel for defendant submit that the alleged cause of action accrued on the date of the injury, and that it was not incumbent upon the plaintiff, prior to the commencement thereto, to present her claim to the city council and file the same with the city auditor, as provided for in Section 282 of the Charter of the City of Portland; and that the opinion in the case of *Caviness* v. *Vale,* 86 Or. 554 (169 Pac. 95), is decisive of the question. Counsel for plaintiff maintain *inter alia* that said section of the city charter was necessarily complied with by the plaintiff, and that her cause of action did not accrue until sixty days had elapsed after her claim was so presented; and that the action was begun within the time prescribed by law; that by virtue of Section 282 of the charter there was a statutory prohibition staying the commencement of the action during such time. As the accident occurred on May 6, 1915, and the complaint was not filed until July 5, 1917, it is apparent from the complaint that the action was barred by the statute of limitations, unless

the time of its commencement was prolonged by Section 20, L. O. L., or otherwise especially enumerated and provided for by the Code. Section 20 reads thus:

"When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action."

Section 282 of the city charter reads as follows:

"Every claim for damages against the City must be presented to the Council and filed with the Auditor within six months from the taking effect of this Charter or within six months after the time when such claim for damages accrues; otherwise there shall be no recovery on any such claim. No ordinance shall be passed allowing any such claim, or any part thereof, or appropriating money or other property to pay or satisfy the same, or any part thereof, until such claim has been referred to the proper department, nor until such department has made its report to the Council thereon pursuant to such reference, unless judgment has been rendered on such claim. No action shall be maintained against the City for any claim for damages until the same has been presented to the Council and filed with the Auditor as above set out and sixty days have elapsed after such presentation."

The question therefore is, Does the expression "claim for damages" include claims arising *ex delicto,* and especially claims arising from injuries occasioned by defects in a street?

In the case of *Caviness* v. *City of Vale,* 86 Or. 554 (169 Pac. 95), decided December 11, 1917, this court construed a section of the charter of the City of Vale which is admittedly identical in its wording with this section of the Portland charter. The reasoning followed in the construction of the Vale charter applies in the construction of the Portland charter. The opinion

in that case is a final determination of the question presented, adversely to the contention of plaintiff. At page 558 of the opinion, Chief Justice McBRIDE said:

"It is contended that the complaint is insufficient as against the city for the reasons (1) that the claim was not presented within six months after the injury, as required by the charter, * *

"The first contention is settled adversely to the claim of respondent in *Sheridan* v. *City of Salem,* 14 Or. 328 (12 Pac. 925), wherein it was held that a provision of the charter which provided that 'no claim against the city shall be paid until it is audited and allowed by the common council' did not apply to claims arising *ex delicto.* * * The words 'claim for damages' used in the Vale charter, if standing alone and without reference to other provisions of the charter, would seem to be broad enough to include claims arising *ex delicto.* But a fair construction would seem to be that which would refer the language to such claims as the charter authorized the city to audit and pay. The object was to give the city the option of examining into the merits of the claim and paying it without an action, if deemed proper. In view of the fact that Section 200 of the charter expressly declares that the city shall not be liable for claims of the character herein described, it cannot be held that it was in the legislative mind to require the presentation to the council of a claim which it was expressly prohibited from paying. To do so would be to require the performance of a vain and useless ceremony. The authorities upon this subject are conflicting and will be found collated in an exhaustive note in *Henry* v. *Lincoln,* 93 Neb. 331 (140 N. W. 664), as reported in 50 L. R. A. (N. S.) 174), and in *Miller* v. *Mullan,* 17 Idaho, 28 (104 Pac. 660, 19 Ann. Cas. 1107)."

We adhere to the conclusion reached in that case by the Chief Justice. We do not believe that this section was ever intended by the framers of the charter to apply to actions *ex delicto.* In *Sheridan* v. *City of*

Salem, 14 Or. 328, at page 333 (12 Pac. 925, at page 926), of the opinion, Mr. Justice THAYER, in discussing this question, said:

"The breach of payment in the action of *assumpsit* is a necessary allegation, but it does not figure at all in an action of trespass on the case. The city only agrees to pay a contracted indebtedness in case the claim is presented as mentioned, and the action is for a refusal to audit and allow it; but if it commit a tort, the action matures at once."

Section 281 of the Portland charter attempts to exempt the City of Portland from liability for damages sustained by reason of a defective condition of a street in the same manner as the Vale charter attempts to exempt the City of Vale. Section 281 clearly shows that the legislature did not have in mind that claims for such injuries should ever be presented to the city. The plain language of the section quoted above prohibiting the appropriation of money to pay "such claims" until the same has been referred to the proper department and reported to the council by such department "unless judgment has been rendered on such claim" contemplates that a judgment will be rendered on certain claims against the city, without the presentation of such claims in the manner provided for in this section. This language indicates that the main object of this portion of the charter was to regulate the manner of conducting such affairs by the city government, and not to control the time for action by the courts. Therefore, it cannot be said that such a claim comes within the provisions of Section 282 of the city charter. The same rule must be applied as when in a case where the position of the parties is reversed and the plaintiff did not file a claim for damages with the city officials, as in the Vale case. There

was no statutory prohibition against the plaintiff's action before filing her claim with the city authorities.

3, 4. Counsel for plaintiff invoke the provision of Section 21, L. O. L., which reads thus:

"If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die, and the cause of action survives, his heirs or personal representatives, may commence a new action within one year after the reversal."

The facts to which plaintiff would apply the law contained in this section are stated in plaintiff's brief in effect as follows: That Victoria I. Colby, plaintiff, prior to the institution of the present action, filed a joint action against the City of Portland, city commissioners and city engineer on the second day of October, 1916. The case was then pending in the court, until the twelfth day of December, 1916, when the trial court by verbal order, which was never entered of record, granted a nonsuit as against the City of Portland. The case went to the jury against the other joint defendants and it returned a verdict for plaintiff. Defendants appealed to the Supreme Court and on the third day of July, 1917, this court reversed the judgment of the lower court, and remanded the cause for a new trial: *Colby* v. *City of Portland,* 85 Or. 359 (166 Pac. 537).

The conditions of the present case do not come within the provisions of Section 21, L. O. L. In order to bring the case within the time prescribed in that section, plaintiff must have obtained a judgment against the defendant City of Portland in the former action, and the same have been reversed on appeal. The reason of the rule prescribed by such a statute is that if an action is commenced by a plaintiff against a

defendant while another action is pending between the same parties, the pendency of such prior action would be a ground for abatement of the second. The statute contemplates that where a judgment is rendered in an action in favor of the plaintiff, and against the defendant, which is reversed upon appeal, the plaintiff is allowed one year after such reversal in which to commence a new action against such defendant. In the present case, as the facts are stated by plaintiff, there was no action pending against the defendant City of Portland after the twelfth day of December, 1916. No judgment in favor of plaintiff and against this defendant was rendered in the former action or reversed on appeal. After the nonsuit as to the City of Portland on December 12, 1916, there was nothing to prevent plaintiff from commencing a new action against such defendant. If the first action had been proceeded with against the present defendant after the nonsuit and had been reversed and remanded for a new trial as to this defendant, then there would have been no necessity for the bringing of a new action. The running of the statute of limitations is not interrupted by the commencement of an action against the servant of the real party in interest: 25 Cyc. 1299(b); *Lattie-Morrison* v. *Holladay,* 27 Or. 175 (39 Pac. 1100). The pendency of the action against the servants of the defendant city, after December 12, 1916, did not interfere with the right of the plaintiff to bring a new action or toll the statute of limitations in the case at bar. The peculiar language of the statute must control in all cases, as the courts are without power to extend the provisions beyond the plain language of the enactment. 19 Am. & Eng. Ency. of Law (2 ed.), 263, as stated in that volume at page 260:

"e. MUST BE AGAINST PROPER DEFENDANT.—A suit begun against a stranger or one who sustains no such relation to the proper defendant that a judgment against him would bind such defendant, can have no effect on the operation of the statute in favor of the party against whom the cause of action properly exists."

See, also, *Wallace* v. *Swepston*, 74 Ark. 520 (86 S. W. 398, 109 Am. St. Rep. 94); *Laughlin* v. *Calumet & Chicago Canal & Dock Co.*, 65 Fed. 441 (13 C. C. A. 1); *Robinson* v. *Thompson* (Tex. Civ. App.), 52 S. W. 117; *Meyer Bros. Drug Co.* v. *Fry* (Tex. Civ. App.), 48 S. W. 752; *Damon* v. *Leque*, 17 Wash. 573 (50 Pac. 485, 61 Am. St. Rep. 927). It would not be suggested that the city would be bound by a judgment against the city commissioners, or engineer. Under our statute, a nonsuit does not have the effect to bar another action for the same cause, but the time for bringing such other action is not extended on account of such nonsuit: Section 184, L. O. L.

The present action was not commenced within the time prescribed by the Code, viz., within two years after the cause of action accrued, and is barred.

The judgment of the lower court is therefore reversed, and the case dismissed.

REVERSED AND DISMISSED.

Argued February 5, affirmed February 19, rehearing denied May 3, motion to recall mandate denied September 24, 1918.

SCHMID *v.* THORSEN.*

(170 Pac. 930; 175 Pac. 74.)

Exceptions, Bill of Review.

1. A bill of exceptions to rulings made in settling the original bill will not be considered.

Landlord and Tenant—Action for Rent—Failure to Give Possession.

2. In action for rent, the defense that the lessor failed to put defendants in possession was not sustained, where they occupied property for six years before discovering a slight encroachment upon it, and thereafter arranged with the lessor for erecting improvements.

[As to landlord's duty to put tenant into possession, see note in 134 Am. St. Rep. 916.]

Landlord and Tenant—"Eviction"—Condemnation.

3. A city's condemnation of a part of leased premises does not constitute an "eviction," excusing nonpayment of rent.

Landlord and Tenant—Rental Action—Sufficiency of Evidence.

4. In rental action, evidence that a city would remove its encroachment upon part of the property if the lessor would donate a much more valuable portion for street improvement purposes, which he refused to do, resulting in condemnation proceedings, *held* not to show that the lessor unreasonably delayed settling the controversy with the city.

Landlord and Tenant—Rental Action—Counterclaim.

5. In a rental action, defendant lessee's counterclaim for street improvement damages, awarded to lessor in condemnation proceedings then pending upon appeal, was properly excluded.

Landlord and Tenant—Delinquent Taxes—Lessee's Liability.

6. Where lease required the lessee to pay taxes, the lessor may recover delinquent taxes which were a lien upon the property, but which he had not in fact paid.

ON MOTION TO RECALL MANDATE.

Courts—Opinions—Requisites and Sufficiency—"Concise Statement."

7. Under Article VII, Section 4, of the Constitution, providing that at the close of each term the judges shall file concise written statements of their decisions, the term "concise statement" means the conclusion, rather than the reasoning, and the court need not separately discuss each and every assignment of error.

*On effect of taking property by eminent domain on liability for rent, see note in 21 L. R. A. 213 and 222. REPORTER.

Landlord and Tenant—Right to Rent.

8. A lessor cannot recover rent when by his own acts he has deprived the lessee of the beneficial use of the property.

Landlord and Tenant—Right to Rent—Condemnation Proceedings.

9. A lessor is not bound to protect the lessee against condemnation proceedings, and, if part of the premises are taken thereunder, the tenant is nevertheless liable for the rent for the remainder not taken.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MCBRIDE.

This is an action to recover rent claimed to be due, according to the terms of a certain lease of Lots No. 1 and 2 Block 315, in the City of Portland, Multnomah County, Oregon, which lease was executed on March 8, 1909, and was to continue in force for a period of twenty years, from March 1st of that year. The rent received was to be $500 per month for the first five years; $600 per month for the next five years, $700 per month for the succeeding five years, and $800 per month for the last five years, payable monthly in advance. The lessees were also to pay all taxes, with certain exceptions as to unpaid taxes for 1908. There was a stipulation that lessees should have the option to purchase the property at any time within the first five years by paying a sum stipulated in the lease, or within the second five years by paying a larger sum, but these stipulations are not involved in this controversy. The lessees were to be permitted to demolish the buildings then situated upon the premises, upon the condition that they should replace them with one or more substantial structures to cost not less than $20,000. It was provided that when the buildings then occupying the premises were demolished for the purpose of erecting new buildings, the rent should be reduced to $300 per month for a period of six months,

while such new buildings were being constructed. Said lease contained the usual provisions for forfeiture in the event of nonpayment of rent or breach of covenants, and required the lessees to keep the property insured.

The defendants entered into possession of said property and paid rent until May 30, 1913, when the buildings thereon were destroyed by fire. The property remained idle for a time, the lessor rebating $200 per month of the rent at the request of lessees. On the twenty-third day of March, 1915, a subsidiary agreement was entered into reciting the fact that the buildings had been destroyed and that the lessor had received the sum of $2,300 insurance which, by the terms of the lease, was to be applied toward the construction of a new building which the lessees required to be constructed at a cost of not less than $20,000; that the lessees being unable to finance the construction of such building requested lessor to loan them his credit and mortgage his property to secure them a building loan, therefore it was mutually agreed that the lessees should endeavor to secure a loan of $38,000 payable six years from March 1, 1915, with interest not to exceed 6 per cent per annum, and that in such case all the parties should join in a mortgage upon the leased property. Out of this sum $7,000 was to be applied to the payment of a note and mortgage held by the Northwestern Life Insurance Company against the lessor; $6,000 to be paid to the lessor for his own use and $25,000, or so much thereof as might be necessary, to be used in the construction of a two-story building upon the premises according to plans and specifications to be submitted by Whitehouse & Fouilhoux, architects, and to be approved by the parties; lessees were to pay to lessor interest on $32,000 for a period

of 14 years. It was agreed that the fund for the construction of the building should be placed in the hands of H. F. Latourette as trustee, to be by him disbursed to the contractors for the proposed building, when it was discovered that the buildings of Mr. Leadbetter on one side of the lots and a firehouse erected by the city upon the other, encroached about eleven inches upon the premises on the Washington Street side, of all of which defendants were notified by their architects on March 8, 1915, and defendants had full knowledge and notice of this alleged encroachment when the subsidiary agreement was entered into on March 28th. Immediately after the discovery of the encroachment by the city's firehouse, negotiations were begun with the city engineer and commissioner of public works to induce the city to remove the building, or at least to vacate so much of the ground as encroached upon the leased premises. When the matter was called to the attention of the city council it seems to have been suggested that the circumstances were propitious for the city to secure a widening of Washington Street in front of the leased premises and the lot held by the city, by refusing to vacate a small strip 11 inches in width and about 50 feet in length on the west side of the leased premises, in order to compel Schmid to dedicate a strip extending along the entire front of his property on Washington Street and containing 495 feet. The parties, after months of negotiations, were unable to agree and for nearly a year there was a constant probability that the city would attempt the widening of Washington Street at the expense of plaintiff's property. On or about April 30, 1915, the city council formally passed a resolution declaring its intention to make said improvement and published notice to that effect immediately thereafter. Practically the only terms pro-

posed by the city for a settlement during the interim was that plaintiff and defendants should dedicate to the city 495 square feet of property fronting upon Washington Street in return for their vacating about 49 square feet of Schmid's property occupied by the firehouse on the west, to which the city had certainly no moral right and probably no legal right. After discussing the matter *pro* and *con* Schmid declined to entertain this one-sided proposition and the city finally instituted an action to condemn the desired frontage upon Washington Street. When that action was brought the present action for arrears of rent was pending, but it was agreed between the parties that the damages assessed for the taking should be wholly in favor of Schmid, who litigated that action for both his lessees and himself, leaving the final adjustment of their mutual damages to abide the event of that action.

On May 12, 1916, the condemnation action was tried and a judgment condemning the frontage desired by the city was rendered, with damages in favor of Schmid in the sum of $8,000, attorneys' fees amounting to $450, and costs and disbursements. The city appealed to this court from the judgment but later having proceeded to avail itself of the benefits of the judgment by entering upon and improving portions of the condemned property, and this fact being shown to this court by affidavit the appeal was dismissed and the judgment affirmed: *Portland* v. *Schmid,* 82 Or. 465 (161 Pac. 560). Later by an original proceeding in *mandamus* the city was compelled to pay the judgment awarded against it in the condemnation proceedings. Both the affirmation of the original judgment and the judgment in *mandamus* were rendered subsequent to the trial of the present case.

To fully state the issues made by the pleadings would consume more space in the reports than is practicable.

In brief the complaint and supplemental complaint state a cause of action for rent unpaid and delinquent, taxes paid by plaintiff in one instance, and for which his property has become liable to sale in the second instance. The defenses are, that the plaintiff failed to put the defendants in possession of the property leased, this being predicated upon the shortage of .97 of a foot for 50 feet on the west side of the lot. Second, that plaintiff unduly delayed defendants in building upon the property by failing to accede to the city's terms as to dedication of the frontage. Third, that defendants are entitled to counterclaim for the amount of $8,450 adjudged to the plaintiff in the condemnation suit. AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Ralph R. Duniway.*

For respondent there was a brief over the names of *Messrs. Griffith, Leiter & Allen* and *Messrs. Latourette & Latourette,* with oral arguments by *Mr. Harrison Allen* and *Mr. John Latourette.*

McBRIDE, C. J.—1–4. There is a woeful lack of a clear statement of the contentions of the parties in the briefs and we have given above such a synopsis as will perhaps be sufficient for the purposes of this opinion. The evidence alone, much of it entirely irrelevant, would fill an entire volume of the Oregon Reports and to state the barest outline of it would "dizzy the arithmetic of memory" and encumber the opinion with matter of no permanent value. We have here a bill of exceptions settled by the presiding judge, and then a bill of exceptions to the rulings of the presiding judge in settling the original bill. This latter we decline to consider. If such a practice should be permitted there

would be no end to bills of exceptions and supplemental bills of exceptions, except the industry of counsel in preparing them and the complaisance of the presiding judge in certifying them. The whole defense as to the failure to put defendants in possession was evidently an afterthought which occurred to defendants when after six years of unprofitable occupancy of the premises, they discovered the city was encroaching slightly on the west side of the lot. With full knowledge of this fact they induced plaintiff to pledge his credit and his property for $25,000 to enable them to build upon the premises and the testimony indicates clearly that the delay in building was not caused by the lack of sufficient room to erect a building of the dimensions planned, but by the uncertainty as to whether the city would condemn and appropriate the strip of frontage required to widen Washington Street. It is well established that a condemnation of a part of the leased premises does not constitute an eviction; so the fact that the city began condemnation proceedings and finally carried them to completion, does not furnish defendants any excuse for nonpayment of rent. In fact we do not understand that to be the contention of the learned counsel for defendants. His contention is that plaintiff unduly delayed a settlement of the matter to defendants' injury. So far as delaying the suit was concerned, it is to be remembered that the city was the plaintiff and the condemnation suit was brought to trial in regular course, or presumably so, as it is not contended that Schmid interposed any dilatory defense. As to whether he could have compromised the matter without a suit, it appears the only compromise possible would have been for Schmid to have given 495 square feet of his valuable frontage on Washington Street in exchange for 49 square feet of his own prop-

erty on the west side of his lot, to which the city claimed some sort of piratical right by alleged adverse possession. It was established upon the trial of the condemnation suit that the value of the 495 feet of frontage was $8,000, and conceding that the city had a valid claim to the strip on the west side and that it would be as valuable as frontage, the proposition amounted to requiring Schmid to exchange $8,000 worth of property on his front for $800 worth on the west side. He was not bound to agree to any such a proposition, nor to throw away his property to protect his tenants from the consequences of condemnation, or the delay incident thereto.

As far as delaying defendants in the construction of their building, the evidence indicates that plaintiff made unusual sacrifices to enable them to build. He voluntarily mortgaged his property to secure for them the means to build with, no provision for repayment of the principal being made. His conduct from the beginning was that of a fair and even indulgent landlord, and this is only one of many instances wherein people who bought or leased property in Portland during the boom existing up to 1912, have sought to avoid the consequences of the present dull period by repudiating their bargains for unsubstantial reasons. As shown by the testimony, the defendants have continued in possession of the premises and availed themselves of the exertions and credit of plaintiff to secure money to build, and during the pendency of this action were actually building upon the property, and the real gist of their defense is not a counterclaim for the slightly diminished capacity of the building they were erecting but for the delay occasioned by Schmid's refusal to allow the city to take his frontage without adequate compensation.

5. The court did not err in excluding the counterclaim for the amount of damages awarded Schmid in the condemnation action. That case had been appealed and was pending in this court. The appeal involved other questions than that of damages. A reversal might have left the case in such a position that the city could have abandoned the proposed improvement altogether and the final affirmance here was not upon the merits but upon a technical acceptance by the city of the benefits of the judgment, as evidenced by its entering upon and improving the condemned property. Whatever rights the defendants had in the money awarded to Schmid, and it cannot be contended that they did not have some ultimate right, would not ripen until Schmid had collected the award in due course of law. That he used reasonable diligence in the matter is apparent and that anything in this action will estop or bar defendants from collecting from Schmid, when he collects from the city, whatever share of the damages their interest as lessees entitle them to claim cannot be reasonably asserted.

6. The contention that the court erred in submitting to the jury the question of plaintiff's right to recover for delinquent taxes, which were a lien upon the property, but which he had not in fact paid, is untenable: Jones, Landlord & Tenant, § 420. There were numerous exceptions to the ruling of the court in the admission and rejection of evidence, and also personal remarks and arguments of counsel for plaintiff, some of which were not in good taste and might well have been omitted. The case seems to have provoked in some way a personal antagonism between counsel which is to be regretted, but we find nothing that would have been at all likely to prejudice defendants' case before the jury, which seems to have been a remarkably intelligent and

attentive one as their frequent questions indicate. The charge of the court fairly and fully presented the issues. Errors aggregating the ominous number of 23 are urged and to discuss each one separately would be to extend this opinion beyond the limits which the importance of the question demands. We are satisfied that the trial was a fair one and the verdict fully justified by the evidence, which has been read with great care.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.
MOTION TO RECALL MANDATE DENIED.

MR. JUSTICE MOORE, MR. JUSTICE MCCAMANT and MR. JUSTICE BEAN concur.

Denied September 24, 1918.

ON MOTION TO RECALL MANDATE.

(175 Pac. 74.)

Mr. Ralph R. Duniway, for the motion.

Messrs. Griffith, Leiter & Allen and *Messrs. Latourette & Latourette, contra.*

MCBRIDE, C. J.—7. This is a motion to recall the mandate in this case. The matters presented were all considered upon the original hearing and upon the petition for rehearing, but all of the twenty-three assignments of error were not specially noticed in the opinion: *Ante,* p. 575 (170 Pac. 930). Counsel for defendants urges that he has a right under Section 4,

Article VII, of the Constitution, to have each of the assignments separately discussed and passed upon. This section is as follows: "At the close of each term the judges shall file with the Secretary of State concise written statements of the decisions made at that term." We do not construe this provision as requiring the judges to discuss in detail every assignment of error, serious or frivolous, made by counsel on appeal. To do so would entail endless labor upon the court; great additional expense upon the state in the matter of publication, and greatly delay the consideration of cases. The editorial work now consumes a great portion of the time of the court and in the interest of the public the length of opinions should be abridged rather than extended. The term "A concise statement," of a decision looks rather to the conclusion arrived at than to the train of reasoning by which that conclusion was reached.

8, 9. In a communication to the court counsel states that the fundamental question which he desires passed upon is this: "Can a lessor recover rent for the use of property, when he by his own acts is depriving the lessee of the beneficial use of the property." We thought and still think we answered this contention in our original opinion, but as it is short and easily answered we will waive the fact that it comes too late and answer it now. Our answer is "No." But that question is not in this case. Schmid did *not* by his own act deprive the lessees of the beneficial use of the leased property. If this was done it was done by the City of Portland. It proposed to lay out a street over a portion of the property and offered in return for the right to do so, to exchange $800 worth of property, to which it had no moral and probably no legal title,

for $8,000 worth of property which it proposed to take, and when Schmid refused to accept the inequitable bargain, the city commenced condemnation proceedings and finally condemned the property it had demanded. Schmid's crime, in the eyes of counsel, was his refusal to accept this inequitable offer and thereby delaying his lessees in the construction of their building until the condemnation proceedings were concluded. A lessor is not bound to protect his lessee from the result of condemnation proceedings, and a taking of part of the premises under such proceedings does not affect the tenants' liability to pay rent for the remainder not taken: 24 Cyc. 1133, and cases there cited; 16 R. C. L. 946. The rule contended for by counsel would require the lessor to accept any offer, however inequitable, under the penalty of forfeiture of his lease.

As observed by counsel for appellant this proposition is the real meat of the case. Outside of it appellant had no real defense, and consideration of the other errors assigned was unnecessary. We will remark, however, that some of the strictures made by counsel for the plaintiff upon the action of counsel for defendants in advising defendants to withhold rent, were unnecessary and out of taste. The situation was peculiar and the course to be pursued was one upon which able attorneys might well differ, and if we had been of the opinion that this attack affected or could have affected the final result the case would have been sent back for a new trial. But a perusal of the evidence satisfied us the verdict was such as should have been rendered in any event, and it is seldom the case that the trial of one attorney by the other

has any effect upon the jury, except to recoil upon the head of the attorney making it.

The motion to recall the mandate is denied.

MOTION DENIED.

Demurrer to return argued September 10, overruled September 24, 1918.

EX PARTE JACK WESSENS.

(175 Pac. 73.)

Habeas Corpus—Pleading and Issues.

1. On *habeas corpus* the issue arises on the sufficiency of the return, which, under Section 648, L. O. L., may be controverted by demurrer or by reply.

Indictment and Information—Constitutional Provisions—Application.

2. Article VII, Section 5, of the Constitution, as amended by the initiative process in November, 1910, providing that no person shall be charged with crime in the Circuit Court except upon indictment found by grand jury, has no reference to such a complaint as may be made before a circuit judge, as a magistrate, with a view of holding the accused to answer at a subsequent term of the Circuit Court.

Habeas Corpus—Demurrer to Return.

3. A statement in a return in *habeas corpus* that a proceeding resulting in commitment of the petitioner was carried on before a magistrate must be accepted as true on demurrer.

Criminal Law—Accusations Before Magistrate.

4. It is not necessary that an accusation before a magistrate be reduced to writing.

Criminal Law—Accusations Before Magistrate.

5. A magistrate may hold a defendant to answer for whatever crime the evidence taken before him disclosed, whether it be an offense named in the written or oral charge or not.

Habeas Corpus—Commitment.

6. Where the body of an instrument showed that it was a commitment by a circuit judge as committing magistrate, accused is not entitled to discharge on *habeas corpus* merely because the instrument is headed, "In the Circuit Court of the State of Oregon for the County of C."

[As to when the refusal of the writ of *habeas corpus* is justifiable, see note in 67 Am. Dec. 395.]

Original proceeding in Supreme Court.

In Banc.

Claiming to be unlawfully imprisoned by the sheriff of Clatsop County, the petitioner obtained a writ of *habeas corpus* from this court, commanding the officer to state the cause of the detention, in pursuance of which the latter made return to the effect that on September 4, 1918, in Clatsop County, Oregon, the petitioner was accused before the circuit judge of that county, sitting as a magistrate, of the crime of unlawful gaming, by an information, a copy of which is annexed to the petition herein and made a part of the return by reference. It is further stated by the sheriff, in substance, that at said hearing, on consideration of the proofs, the magistrate found that the petitioner here had committed a crime designated as "indecent and immoral acts not otherwise made punishable," ordered that he be held to answer therefor, fixing the bail in the sum of $100, and thereupon issued to the sheriff a commitment in the form prescribed by Section 1797, L. O. L., which is set out in the return and will be more fully noticed hereafter. It is also stated that the defendant has not given bail. The matter was heard before us on demurrer to this return.

DEMURRER OVERRULED.

For petitioner there was a brief over the name of *Messrs. Norblad & Hesse,* with an oral argument by *Mr. Frank C. Hesse.*

For the State there was a brief and an oral argument by *Mr. George M. Brown,* Attorney General.

BURNETT, J.—1. On *habeas corpus* the issue arises on the sufficiency of the return. It may be contro-

verted by demurrer or by reply: Section 648, L. O. L.; *Merriman* v. *Morgan,* 7 Or. 68.

2. A circuit judge is a magistrate: Section 1735, L. O. L. The argument of the petitioner at the hearing of the demurrer was that the complaint upon which the circuit judge acted was entitled "In the Circuit Court of the State of Oregon for the County of Clatsop" and amounted to charging the defendant therein named in the Circuit Court otherwise than upon an indictment by the grand jury, which he contends is violative of Article VII, Section 5, of the Constitution as amended by the initiative process in November, 1910. It is said therein that, "no person shall be charged in any Circuit Court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state except upon indictment found by a grand jury." The "charge" there meant is one upon which the person accused may be put upon trial and convicted by final judgment. It has no reference to such a complaint as may be made before a magistrate with a view of holding the accused to answer at a subsequent term of the Circuit Court. The constitutional amendment was designed to dispense with prosecution by information as authorized by the act of February 17, 1899, and codified as Chapter IV of Title XVIII, B. & C. Comp.

3. The return says that the proceeding resulting in the commitment of the petitioner was carried on before a magistrate. On demurrer this must be accepted as true. It matters not that the magistrate happened to be a circuit judge.

4–6. It is not necessary under our statute that the accusation before a magistrate be reduced to writing: *Hannah* v. *Wells,* 4 Or. 249; *Malheur County* v. *Carter,* 52 Or. 616 (98 Pac. 489). It is lawful, also, for such

an officer to hold the defendant to answer for whatever crime the evidence taken before him disclosed, whether it be an offense named in the written or oral charge or not. In other words, having before him an individual charged with a crime, either orally or otherwise, the magistrate may hold him to answer for whatever offense is established by the evidence, and we apprehend that he has a right to consider the real substance of the charge without reference to whether it was adorned with the title of any court or not. The same principle applies to the commitment itself. It appears upon the face thereof to be issued and signed by a magistrate, for it is subscribed, "J. A. Eakin, Circuit Judge and Committing Magistrate." It is issued in the name of the State of Oregon to the sheriff of the county of Clatsop and recites in the words of the form indicated by the statute:

"An order having been this day made by me that" the defendant, naming him, "be held upon a charge of having committed indecent and immoral acts, you are therefore commanded to receive him in your custody and detain him until legally discharged. * * "

It is true that this commitment is entitled, "In the Circuit Court of the State of Oregon for the County of Clatsop"; this, however, is not matter of substance. The efficacy of the document is found in the body thereof and we would not be justified in discharging the prisoner merely because the officer issuing the writ had put upon it an erroneous label.

The principle is that: "The court will not, in ordering a writ of *habeas corpus,* inquire into the legality or justice of the mandate under which the petitioner is held, if it is not defective in matter of substance": *People ex rel.* v. *Mensching,* 187 N. Y. 8 (79 N. E. 884,

10 Ann. Cas. 101, 10 L. R. A. (N. S.) 625); *In re Milecke,* 52 Wash. 312 (100 Pac. 743, 132 Am. St. Rep. 968, 21 L. R A. (N. S.) 259); *Ex parte Robinson* (Fla.), 75 South. 604 (L. R. A. 1918B, 1148); *Ex parte Stacey,* 45 Or. 85 (75 Pac. 1060); *Ex parte Foster,* 69 Or. 319 (138 Pac. 849); *Long* v. *Minto,* 81 Or. 281 (158 Pac. 805). Taking the whole return as true, as we must on the demurrer, it appears that the sheriff holds the petitioner by virtue of a commitment issued by a magistrate and substantially conforming to the Code, as against the objection urged. The demurrer is therefore overruled. DEMURRER OVERRULED.

Argued July 23, affirmed September 24, 1918.

LEUDINGHAUS BROS. *v.* DANT & RUSSELL.

(175 Pac. 75.)

Principal and Agent—Undisclosed Principal—Burden of Proof.

1. In an action for the value of a carload of lumber, defendant, setting up counterclaims on the ground its sale of lumber to a corporation was a sale to its officers and stockholders, including plaintiffs, and that as undisclosed principals they were liable for the corporation's default in payment, had the burden of proof.

Principal and Agent—Undisclosed Principal—Sufficiency of Evidence.

2. In an action by a partnership for the value of a carload of lumber, evidence *held* not to sustain counterclaims on account of lumber delivered by defendant to a corporation, on the ground that such sale was a sale to plaintiffs as undisclosed principals.

[As to suits by undisclosed principals on contracts made by their agents, see note in 55 **Am. St. Rep.** 916.]

From Multnomah: ROBERT G. MORROW, Judge.

Department 2.

The plaintiffs commenced this action against the defendant corporation to recover $1,049.16, the alleged value of a carload of lumber.

The defendant admits the purchase and the value, and as a defense pleads six separate counterclaims amounting to $821.15. The Northwest Lumber Agency is a corporation organized under the laws of the State of Washington on or about February 20, 1912, with its principal office at Tacoma; with authority,

"to purchase, acquire, hold, exchange, dispose of or sell on commission or otherwise, lumber or other timber products, and to act as agent or broker in the purchase, sale or disposition of any personal property."

The different items of counterclaim were for and on account of lumber which the defendant furnished and delivered to, and at the instance of, the Northwest Lumber Agency on and between April 13, 1915, and April 24, 1915, for which the defendant never received payment. In its further and separate answer the defendant alleges that it

"sold and delivered to the plaintiffs acting through the said Northwest Lumber Agency, and at the special instance and request of said Northwest Lumber Agency, which was acting as agent of the plaintiffs, and plaintiffs were the undisclosed principals of said Northwest Lumber Agency in making such purchase," and "that defendant has discovered that said plaintiffs were the undisclosed principals of said Northwest Lumber Agency in making said purchase and defendant has demanded payment of plaintiffs";

That in truth and fact the alleged sales made to the Northwest Lumber Agency were made to the plaintiffs, and the plaintiffs were liable to defendant for the amount of said sales. On the trial it was stipulated that the defendant did purchase the lumber from the plaintiffs, at the agreed price of $1,049.15, and that if the defendant is entitled to recover on its counterclaims, the amounts thereof are correct.

To prove its counterclaims against the plaintiffs, the defendant introduced in evidence the corporate records of the Northwest Lumber Agency, certain letters and orders for lumber, a copy of the bond, together with two stock certificates in that company, and called as witnesses C. L. Brown, F. W. Luedinghaus and A. K. Martin, officers of the company. From this evidence and testimony it appears that the capital stock of the company was $5,000, divided into fifty shares of the par value of $100 each; that on April 27, 1912, the company completed its organization and elected its officers, C. O. Sutherland as president, T. J. Handforth, secretary, and F. J. Shields, manager. Neither the stock certificate book nor the stock ledger is in evidence and it does not appear from the corporate minutes who were the actual stockholders of the corporation at the time it was organized, or when the members became stockholders. But under date of September 20, 1912, the minutes show that the plaintiffs were present and represented at a stockholders' meeting of the company. The stock certificates offered in evidence show that one for two shares was issued to George F. Luedinghaus on November 13, 1914, and another for two shares was issued to F. W. Luedinghaus on the same date, and the testimony shows that the stock was fully paid for. It also shows that at different times capital stock of the company was issued to and held by a number of lumber companies from which it purchased lumber and with which it had large business dealings.

When the defense rested, the plaintiffs filed a motion for a nonsuit as to the counterclaims and for a directed verdict, which was sustained, and judgment was entered on the verdict, from which this appeal is

taken. The question presented is whether there was sufficient evidence of the defendant's counterclaims against the plaintiffs to be submitted to the jury.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Ralph R. Duniway.*

For respondents there was a brief over the name of *Messrs. Magill, McKenny & Brush,* with an oral argument by *Mr. W. F. Magill.*

JOHNS, J.—1. The legal principles contended for by defendant's counsel are sound and sustained by the authorities cited. The defense is founded upon the theory that the Northwest Lumber Agency is a "blind" corporation and that in the sale and purchase of lumber by that company it was the agent of, and acting for, the owners of the different mill companies which owned or held stock in the Northwest Lumber Agency; that a sale to that company was in truth and fact a sale to the individual stockholders of the company and that because the plaintiffs were personally stockholders, and one of them president of the company, they are liable to the defendant for the amount of its unpaid claim against the Northwest Lumber Agency. The *onus probandi* was on the defendant. Much latitude was allowed by the trial court.

2. The plaintiffs were not incorporators and there is no testimony that they were original stockholders of the Northwest Lumber Agency or that they ever owned more than four of the fifty shares of its capital stock, which they acquired November 13, 1914, and for which they paid par value. Neither is there any evidence that their dealings and relations with the Northwest Lumber Agency were at all different from those of

any other stockholder, and there is no more testimony against the plaintiffs as to liability on the counterclaims than there is against any other officer or stockholder. The orders for the lumber were placed with the defendant by the Northwest Lumber Agency with instructions to attach a sight draft to the bill of lading for 90 per cent of the invoice price. This was done with all but the last order, and the drafts were paid. The last invoice, to which through an oversight the draft was not attached, and the remaining 10 per cent of the former invoices, for which the defendant claims that the plaintiffs are liable, have never been paid.

We have carefully read and considered all of the testimony which was produced and offered, and while it may be true that some of the stockholders of the Northwest Lumber Agency, including the plaintiffs, as individuals did indirectly receive the benefits of the unpaid balance, there is no testimony which tends to show or from which a jury could find that in the placing of such orders the Northwest Lumber Agency was acting for or as the agent of the plaintiffs, or that the plaintiffs ever contracted for the lumber or authorized any contract to be made for them, or that they are liable on the counterclaims. Speaking in mining parlance, we are of the opinion that the defendant was on a blind lead in which his counsel after a vigorous and exhaustive search found a few colors, but never did find the pay-streak. The defendant's claim was and is against the Northwest Lumber Agency.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN, J., concur.

BURNETT, J., Concurring.—The utmost the defense has shown by its testimony is that it sold lumber to the Northwest Lumber Agency, a corporation in which the plaintiffs had four shares of stock. All the witnesses who spoke on the subject say that the plaintiffs did not receive any of the lumber sold by the defendant or any of the proceeds of the sale thereof. There was no error in denying the defendant's offer of the unsigned draft of an agreement to the effect that thirteen lumber firms, including the plaintiffs, should sell their output exclusively to the Northwest Lumber Agency as it might require, with draft for 90 per cent of the price attached to each invoice. Such a contract would not make that concern agent for any of the parties agreeing to the arrangement. Moreover, even if they did sell to the Northwest Lumber Agency it seems that the defendant went and did likewise. It does not lie in the mouth of the latter to charge its fellow-sufferers with the default of the insolvent corporation by which they all came to grief. The defendant extended credit to the Northwest Lumber Agency. The stockholders of that corporation are not liable directly for its debts, nor in any event, except to the extent of their unpaid subscriptions to its capital stock: Article XI, Section 3, Oregon Constitution. Although such a liability may exist, it cannot be enforced in this action: *Macbeth* v. *Banfield,* 45 Or. 553 (78 Pac. 693, 106 Am. St. Rep. 670); *Patterson* v. *Lynde,* 106 U. S. 519 (27 L. Ed. 265, 1 Sup. Ct. Rep. 432). For these reasons I concur in the result of the opinion of Mr. Justice JOHNS.

Argued on motion to recall mandate September 9, allowed September 24, 1918.

McCARGER *v.* MOORE.

(175 Pac. 77.)

(Also see, 88 Or. 682.)

Courts—Jurisdiction of Supreme Court.

1. Aside from *mandamus*, *quo warranto* and *habeas corpus* proceedings, the Supreme Court is one of limited jurisdiction, and cannot acquire authority to act in any cause, except in the manner provided by statute.

Appeal and Error—Dismissal of Appeal.

2. Laws of 1913, Chapter 320, Section 554, subdivision 2, must be read in connection with other provisions, and, where notice of appeal was not served in time, the Supreme Court has no authority to enforce the judgment of the lower court against a surety in the undertaking for a stay of proceedings, but can only dismiss the appeal.

Appeal and Error—Correction of Judgment.

3. Where notice of appeal was not served in time, and the Supreme Court in its judgment attempted to enforce the judgment of the lower court against the surety in the undertaking for a stay of proceedings under Laws of 1913, Chapter 320, Section 554, subdivision 2, rendition of judgment against surety for the amount of the judgment of the Circuit Court is a clerical misprision, which the Supreme Court is authorized to correct after remand.

From Multnomah: HENRY E. McGINN, Judge.

Department 1.

Originally the plaintiffs began an attachment action against the defendant, in the Circuit Court of Multnomah County, and levied the writ upon property. The defendant gave bond to release the attachment with the Illinois Surety Company on his undertaking. Afterwards, without the consent of the surety, judgment was rendered in that court against the defendant for the amount named in the complaint. The company moved the Circuit Court to open the case and allow it to defend, on the ground that the judgment was taken without notice to it, but the motion was overruled

and it appealed to this court. The plaintiffs moved to dismiss the appeal but the question was reserved for final argument: 88 Or. 683 (157 Pac. 1107). The motion was renewed at a later date and was allowed, 88 Or. 686 (171 Pac. 587), on the ground that the notice of appeal had not been served within the sixty days provided by the statute: Section 550, subd. 5, L. O. L., as amended by the General Laws of Oregon for 1913, p. 617. The costs of the appeal were thereupon taxed against the Illinois Surety Company and its surety on appeal, the New Amsterdam Casualty Company: 88 Or. 687 (173 Pac. 258). Judgment was thereupon entered, not only dismissing the appeal but also against the Illinois Surety Company and its surety, the New Amsterdam Casualty Company, for the full amount of the judgment of the Circuit Court in the sum of $581.15 with interest from a date mentioned, and a mandate was issued to the Circuit Court accordingly. The case has now been heard on the motion of the New Amsterdam Casualty Company to recall the mandate and correct the judgment embodied therein so that the same shall operate against it as dismissing the appeal and for the costs and disbursements of this court on the motion to dismiss only, and not for the principal judgment. MANDATE RECALLED.

For the motion to recall mandate there was a brief submitted by *Mr. Thomas Mannix.*

Contra, there was a brief over the name of *Messrs. Senn, Ekwall & Reckon,* with an oral argument by *Mr. Frank Senn.*

BURNETT, J.—The undertaking given by the New Amsterdam Casualty Company provided, "that if said judgment or any part thereof be affirmed, the appellant

will satisfy the same so far as affirmed," having been given for a stay of proceedings as provided in Section 551, L. O. L.

1, 2. The judicial system of the state has not been changed otherwise than as provided in the amended form of Article VII of the State Constitution adopted by the initiative process at the general election of November, 1910, and Section 6 of the article as it formerly read remains in force, by which it is declared that:

"The Supreme Court shall have jurisdiction only to revise the final decisions of the Circuit Court."

The only exception to this rule promulgated by the amendment referred to is that the court may in its own discretion take original jurisdiction in *mandamus, quo warranto* and *habeas corpus* proceedings: Article VII, § 2. This court, therefore, is one of limited jurisdiction aside from the instances just mentioned. It cannot acquire authority to act except in the manner provided by statute, in a case of the kind before us, and can exercise only power expressly conferred upon it by statute. Except in the stated instances of our original jurisdiction, authority of this court to hear and determine a case is derived from perfection of an appeal. That result is accomplished either by giving oral notice at the time of the rendition of the judgment appealed from or by causing a notice to be served upon the adverse party, filing the original with proof of service indorsed thereon with the clerk of the court in which the judgment appealed from is entered, and by serving or filing an undertaking, all as provided by Section 550, L. O. L., as amended by Chapter 319 of the Laws of 1913, which section requires that the appeal shall be taken and perfected in the manner therein prescribed and not otherwise. There are provisions in Section 554, as amended by Chapter 320, Laws of

1913, about filing a transcript or an abstract within thirty days after the perfection of the appeal, and it is therein declared that:

"After compliance with the provisions hereof the appellate court shall have jurisdiction of the cause, but not otherwise."

An abandonment of an appeal is defined in that section, substantially, as a failure to file a transcript within the thirty days mentioned, unless such time shall have been enlarged, and the last subdivision of the section reads thus:

"If the appeal be abandoned as provided in subdivision 2 of this section, thereupon the judgment or the decree, so far as it is for the recovery of money, may, by the appellate court, be enforced against the sureties in the undertaking for a stay of proceedings, as if they were parties to such judgment or decree."

This, however, must be read in connection with the other provisions of the statute about serving notice of appeal in the manner and time required by the law, which it has always been held is essential to the jurisdiction of this court: *Baskin* v. *Marion County,* 70 Or. 363 (141 Pac. 1014).

At the argument, counsel cited *Simpson* v. *Prather,* 5 Or. 87; *Peck* v. *Curlee Clothing Co.* (Okl.), 162 Pac. 735; *Dunterman* v. *Storey,* 40 Neb. 447 (58 N. W. 949); *Flannagan* v. *Cleveland,* 44 Neb. 58 (62 N. W. 297), and *Morgan* v. *Soisson,* 21 Pa. Super. Ct. 141; all of which, however, are cases where an original action had been brought upon the undertaking in a court of general jurisdiction. Without intimating what the rule would be in this state in an action on the undertaking here involved, we hold that whatever the liability on the instrument it cannot be enforced in any court, much less in a court having only the limited authority to

hear and determine appeals, unless the court has jurisdiction of the cause and the subject matter. But inasmuch as the notice of appeal was not served in time, this court did not obtain jurisdiction, either of the respondent or of the appellants' surety. All that could be done and all that was done in fact was for the court to decline to hear the case, and purge its records of the matter by dismissing the appeal. The costs in this court followed as an incident of the motion to dismiss, but lawfully we could go no further. The result was to leave the judgment of the Circuit Court intact, not on account of what we did, but by reason of what we did not, for want of jurisdiction. We could not add to or detract from that judgment on the record before us.

3. Under the statute, this court can render judgment against the surety for the principal sum of the judgment appealed from only when it is in a position positively to affirm such a judgment of the lower court upon a full hearing in this court. The rendition of the judgment against the surety on appeal for the full amount of the judgment of the Circuit Court must be set down as a clerical misprision which we are authorized to correct. The motion to recall the mandate, therefore, must be allowed, and the judgment corrected so as merely to dismiss the appeal, allowing against the Illinois Surety Company and the New Amsterdam Casualty Company only the costs and disbursements on the motion to dismiss, which are not in this instance resisted. No further costs will be allowed to either party. Motion to Recall Mandate Allowed.

McBride, C. J., and Bean and Benson, JJ., concur.

Submitted on briefs September 3, reversed September 24, 1918.

HINER *v.* PITTS.

(175 Pac. 133.)

Bailment—Lien for Work—Possession.

1. It was competent for the legislature, by enactment of Section 7497 et seq., L. O. L., as amended by Laws of 1911, page 213, as to liens upon chattels, to provide for a lien notwithstanding the claimants had not possession of the property, since the lien rests upon the doing of labor or furnishing material.

Bailment—Lien—Loss—Lapse of Time.

2. Claimant of lien on chattel *held* to have performed work in various months under a single contract, so as to be entitled to a lien for the entire amount of work done, notwithstanding the lapse between dates on which the work was done.

Bailment—Lien—Notice of Claim.

3. Where defendants, owning donkey-engine, desired its occasional repair during logging season, and authorized plaintiff to make the repairs on the job, so as to keep the engine running, plaintiff had a qualified possession, which was terminated by the mutual agreement to abrogate the contract, so that notice within 60 days after the abrogation of the contract was in time, under Section 7497 et seq., L. O. L., as amended by Laws of 1911, page 213.

[As to lien on automobile for repairs or storage, see note in Ann. Cas. 1916A, 630.]

From Tillamook: GEORGE R. BAGLEY, Judge.

In Banc.

The plaintiffs, claiming to be blacksmiths and machinists, are seeking to enforce a lien upon a donkey-engine for the reasonable value of their labor and material expended in repairing it at the request of the defendant Pitts, who was the owner of the same at the time the work was done. The defendant Schiffmann claims to be the owner of the machine by purchase from Pitts after the repairs were made. It is averred in the complaint:

"That on or about the twentieth day of December, 1916, said defendant Pitts and the plaintiffs herein en-

tered into a contract wherein and whereby said defendant Pitts employed plaintiff to overhaul said donkey-engine and equipment, and to place the same in good repair for operating purposes, plaintiffs to furnish such labor, skill and materials as would be necessary to complete said work, and it was also agreed, that inasmuch as said donkey-engine and machinery were being continuously used by defendant Pitts in said logging operations, that the plaintiffs should perform said work at times when the same were not in use by said Pitts, and at such times as would be convenient for all the parties, and that should any breaks or other defects develop in said donkey-engine and machinery during the time the plaintiffs were overhauling the same as hereinbefore set out, such breaks or defects should be repaired as a part of the plaintiffs' agreement in overhauling said donkey-engine.

"That on or about the twenty-second day of December, 1916, plaintiffs entered into the performance of the above agreements, and in performing the same expended labor, skill and materials upon the donkey-engine herein described, a statement of account of the labor, skill and materials so expended being attached to copy of lien which is attached to the complaint and marked 'Exhibit A.'

"That on or about the thirtieth day of March, 1917, and before the plaintiffs had completed the performance of the above-mentioned contract, said contract was, by mutual consent of the parties hereto, canceled, and the rendition of the labor, skill and materials provided in said contract was closed on said thirtieth day of March, 1917."

Besides this, it is alleged that the reasonable value of the labor, skill and materials laid out upon the engine was $136, which Pitts promised to pay and has not paid, except $10. Then follow allegations about filing a notice of lien, the expense thereof and the reasonable sum to be allowed as an attorney's fee.

Pitts did not appear, but Schiffmann answered, denying all the allegations of the complaint on information and belief, and further charged in substance that no part of the work was performed by the plaintiffs subsequent to February 10, 1917, except the labor charged March 27th, 28th and 30th of that year, amounting to $26.75, which he avers was tendered by him to the plaintiffs and refused. He brings that amount into court.

The tender and refusal are admitted by the reply; other allegations of the answer are denied. The Circuit Court reached the conclusion that the plaintiffs were not entitled to the lien, but decreed that they should recover the amount tendered and brought into court, without costs to either party. The plaintiffs appeal. REVERSED. DECREE RENDERED.

For appellants there was a brief submitted by *Mr. George P. Winslow.*

For respondent there was a brief submitted by *Mr. H. T. Botts.*

BURNETT, J.—1. This proceeding was instituted under Section 7497 et seq., L. O. L., as amended by the act of February 21, 1911 (Laws of 1911, Chapter 159), as follows:

"Every blacksmith, wagon-maker, automobile repairer and machinist who has expended labor, skill and material on any chattel at the request of its owner, * * shall have a lien upon said chattel for the contract price for such expenditure, or in the absence of such contract price, for the reasonable worth of such expenditure, for the period of one year from and after such expenditure, notwithstanding the fact that the possession of such chattel has been surrendered to the owner thereof."

At common law, one performing such services in the repair or manufacture of a chattel had a lien thereupon so long as he retained possession of the goods, but the moment he gave up that custody his lien ended. It was competent for the legislative power to award a lien irrespective of possession. This statute directly declares that the persons named therein who rendered the services described, at the request of the owner of the chattel, have a lien thereupon. The concluding clause of Section 7497, "notwithstanding the fact that the possession of such chattel has been surrendered to the owner thereof," does not detract from the force of the language in the earlier part of the section, awarding a lien. The foundation of the lien in all cases, whether at common law or under this statute, is the furnishing of material or labor. The retention of possession was the only means known at common law for the enforcement of the right grounded upon the things supplied or services rendered. No matter how long the person had retained possession, he would not have a lien unless he had done or furnished something for the repair or improvement of the chattel. While it retains the condition of performance of labor or supply of material as the basis of a lien, the statute does not require that the owner be utterly deprived of all charge of the chattel. Possession in the sense of exclusive custody is made a nonessential by this enactment.

2. As to the circumstances under which the work was done in overhauling the machine, the Circuit Court found substantially in accordance with the allegations of the complaint. The facts as disclosed by the testimony, fairly construed, are that in December, 1916, Pitts was engaged in logging operations on the Nehalem River, some twenty-five or thirty miles from the

city of Tillamook, where the plaintiffs had their shop. The machine was considerably out of repair and Pitts engaged the plaintiffs to give it a thorough overhauling, with the proviso that he wished to finish a certain logging undertaking then under way and he wanted the engine kept in sufficient running order for that purpose as part of the contract of general refitting. In pursuance of this understanding, from time to time during the then current winter season, the plaintiffs were called by Pitts to the logging camp to repair the machine. On one occasion they took sundry pieces of it to Tillamook, repaired them there and afterwards reinstated them on the engine. There were several instances of the kind and there was a time between February 10th and the latter part of March, when they did nothing, but on March 27th, 28th and 30th they did more repairing for the purpose of keeping the machine at work. Soon after the date last mentioned, Pitts failed, sold the engine to the defendant Schiffmann, told the plaintiffs he would have no further use for their services and they mutually ended their relationship at that time. Under these conditions, the defendant Schiffmann contends that the various repairs made during the months of December, January and February were separate, independent transactions, for each of which a lien could and should have been asserted, with the consequence that the plaintiffs lost their right to enforce a lien upon that property for the items furnished on February 10th and before that, because the notice was not filed until May 2d. It is upon this theory that Schiffmann tendered $26.75 in discharge of the lien. We think, however, that the items of the claims of the plaintiffs were supplied in pursuance of a single contract resulting in a single demand, notwithstanding the lapse between

the February and March dates: *Pierce-Arrow Company* v. *Irwin,* 86 Or. 683 (169 Pac. 129).

3. It remains to consider whether the notice was filed so as to effectuate the lien. The enactment as amended in 1911 says:

"In order to make such lien effectual the lien claimant shall, within sixty days of the date of the delivery of such chattel to the owner thereof, or his duly authorized agent, file in the office of the county clerk of the county in which said labor, skill and materials were expended on such chattel, a lien notice. * * "

That statute goes on to prescribe the form of the notice, and it was followed in this instance, as the record shows. The question to be determined is: What is the proper signification to be assigned to the words "sixty days from the date of the delivery of such chattel to the owner thereof?" The testimony fairly shows that this work was done in pursuance of the contract made in December and that it was continued until the relation was ended by common consent of the parties at the end of March following. As we glean from the testimony, the evident purpose of the parties was for the plaintiffs to keep the machine in running order until the logging job then on hand was completed, when the contract between them should be completed by a systematic repair of the engine. While this contract was in force the plaintiffs had in a sense a modified possession of the machine. They certainly occupied toward it a relation different from that of any stranger. They could not have been held guilty of trespass in repairing it during that time. For the purpose of mending the machine the then owner granted to them a qualified custody of it. When they mutually ended their contract the plaintiffs gave up this conventional possession of the chattel and sur-

rendered it to Pitts, which is sufficient by a fair construction of the statute to fix the date from which to reckon the sixty days prescribed within which to file a notice of lien. The law should be construed so as to give it effect as reasonably intended by the legislature. Otherwise, no one, however deserving, could ever acquire a lien upon a chattel which would be too large to remove conveniently from the owner's premises. The case of *Thornton* v. *Hallam,* 64 Or. 233 (129 Pac. 1046), is not in point here. That decision was to the effect that one who takes a contract for clearing land does not have such a possession of the tract as would support a lien in favor of his subcontractor against the fee-simple owner of the realty. It depended upon a different statute and was an effort to charge a stranger to the contract whose claim on the property was superior to that of the plaintiff, if he had any. In the instant case the right of the plaintiffs to charge the property accrued before the subsequent purchaser came upon the scene and he took it subject to the statutory burden growing out of the relation between the immediate contracting parties. Thornton sought to charge the land of a person with whom he did not contract, while the present plaintiffs are enforcing their claim against the one with whom they covenanted and are following what was his property into the possession of one who took it subject to their demand. Thornton endeavored to overcome a superior title, while the plaintiffs here are foreclosing an inferior claim.

In brief, here was a single contract under which the plaintiffs from time to time expended labor and materials upon a chattel, which gave them a lien, as the statute expressly says. Incidental to the performance of such services, they had a qualified possession of

the property sufficient for the purposes of the work, and to support subsequent proceedings under the statute. By mutual consent of the parties this relation was ended less than sixty days prior to the filing of the notice of lien. The plaintiffs thus brought themselves fairly within the beneficial provisions of the law and were entitled to enforce their lien. The decree of the Circuit Court is reversed and one here rendered according to the prayer of the complaint.

REVERSED. DECREE RENDERED.

Argued July 11, affirmed September 24, 1918.

CHRISTENSON v. PORTLAND.

(175 Pac. 135.)

Municipal Corporations—Clerk of Employment Bureau—Classification on Civil Service List.

1. Classifying clerk of Portland free employment bureau, created by Ordinance No. 20,035, on civil service list as superintendent, as was done by Ordinance No. 27,951, did not give him any authority; his duties being those of a subordinate under the board's direction.

Municipal Corporations—Free Employment Bureau—Right to be Director—Ordinances.

2. Plaintiff having been clerk of Portland free employment bureau, created by Ordinance No. 20,035, with grade and title of superintendent under Ordinance No. 27,951, *held* not to entitle him to be appointed director of Portland public employment bureau, created by Ordinance No. 31,173.

Municipal Corporations—Superintendent of Free Employment Bureau—Right to Office.

3. Ordinance No. 31,173 of City of Portland, creating public employment bureau, being merely revision of Ordinance No. 20,035, creating free employment bureau, superintendent of free bureau was not legislated out of his office, because its name was changed to that of director and its duties enlarged, and, having been wrongfully removed by mayor, he had substantial right to office under its new name, which was lost by failure to appeal as prescribed by Portland City Charter, Section 108.

[As to what is a public office and how it is distinguished from mere employment, see notes in 72 **Am. Dec.** 179; 63 **Am. St. Rep.** 181.]

Municipal Corporations—Free Employment Bureau—Office of Clerk—Ordinance.

4. Though clerk of free employment bureau of Portland, created by Ordinance No. 20,035, was ranked as superintendent of bureau by Ordinance 27,951, as matter of law he was clerk of bureau, and, after enactment of Ordinance No. 31,173, remained clerk of public employment bureau thereby created, subject to removal by mayor.

Municipal Corporations—Officers—Break in Term—Abolition of Office.

5. If city ordinance professes to abolish office in one clause and in another to reinstate it, office has never been abolished in fact, and there has been no break in term of official.

From Multnomah: ROBERT G. MORROW, Judge.

Department 2.

This is a proceeding in *mandamus* to compel the civil service board of the City of Portland to place the name of plaintiff at the head of the eligible list on the civil service register, and to certify his name to George L. Baker, a commissioner of said city and commissioner of public affairs thereof, and to require such commissioner to appoint plaintiff to the position of director of the Public Employment Bureau of said city, and to require the defendants to pay plaintiff as such director a salary at the rate of $150 per month from November 24, 1915.

The proceeding is based upon the following facts: On September 22, 1909, the City Council of Portland passed Ordinance No. 20,035, providing for a Free Employment Bureau, which ordinance provided, among other things, that the bureau should be under the control, supervision and direction of three members to be appointed by the mayor, and to consist of one member of the City Council; one member of the Trades Council, and one member of the Manufacturers' Association, all of said city. The three persons so appointed were to organize by electing one of its members president and one secretary. Their general duties were, to receive all applications for labor by persons

desiring employment and make a record of the same; to endeavor to procure employment for all applicants; in fine, it seems they were to do without compensation what other employment agencies usually did for a fee. It was further provided that the board should recommend to the mayor from a list of eligible persons a suitable person for clerk, who should be in charge of the office from 8 A. M. to 5 P. M. each day, except Sundays and holidays, and perform such other duties as the board should direct. The compensation for such clerk was fixed at $90 per month, and he was to hold office until his successor should be appointed in the manner above indicated. In January, 1912, plaintiff was appointed clerk of such board. On October 18, 1913, the City Council passed Ordinance No. 27,951, providing for the classification of employees of the City of Portland according to the class, rank and grade of service rendered to the city, and providing a method for standardization of salaries and wages. In this classification plaintiff is ranked as "Superintendent of the Free Employment Bureau," his salary being $1,800 a year. On November 12, 1915, the City Council passed Ordinance No. 31,117, purporting to create a public employment bureau in Portland. In order to indicate the similarities and differences between the newly created bureau and the one previously existing, we give the characteristic features of each in parallel columns.

Old Bureau.	New Bureau.
Name. Free Employment Bureau.	Name. Public Employment Bureau.
Control.	Control.
1. Three members appointed by the Mayor and approved by the Council.	1. Organized by the Commissioner by appointment of two directors, one

Duties of the Board.

2. To receive all applications for labor by persons desiring employment, or desiring to employ labor; to record their names when requested, designating the character of labor or employment and the address of the applicant. To recommend to the Mayor a list of eligible persons, from which a clerk should be selected and appointed by him. To provide all books, etc., necessary for the successful operation of the office. To report to the Council at the beginning of each month the number of persons who have applied for employment; the number for whom employment has been obtained; the kind of employment secured, and whether such employment was in the city of Portland or elsewhere, and such other information as the council should direct.

3. To maintain a signboard upon the door of the office, bearing the designation "Free Employment Bureau of the City of Portland."

for men and one for women and children. Directors to be under the direction of the Commissioner, said directors to perform such duties as are prescribed in the Ordinance, and such other duties as the Commissioner may require.

Duties of Directors.

2. To register applicants as in former ordinance. To put themselves in communication with the principal manufacturers, merchants and other employers of labor. To use diligence to secure the cooperation of such employers in the purposes of the Bureau; to advertise in papers or otherwise, so as to reach such employers; to give all available information as to positions offered to any person applying therefor, and to call the attention of the applicant to any statement or reply thereto with reference to any strike, lockout or industrial dispute, etc.

Clerk.

The Commissioner to appoint such clerks and

Duties of Clerk.	
4. To be in charge of the office from 8 A. M. to 5 P. M. of each day, except Sundays and holidays, and to perform such duties as may be required by the board.	stenographers as may be necessary, the number and salaries thereof to be determined by the Council, and to be selected according to civil service rules.

It was further provided that the directors should have executive and managerial ability; practical knowledge of the problem of unemployment, experience as administrative officers, and a capacity to direct investigations and devise remedies for unemployment.

On November 24, 1915, the City Council passed Ordinance No. 31,173, which professed to repeal Ordinance No. 31,117, and also Ordinances 20,035 and 16,913, which latter ordinance had already been repealed by Ordinance No. 20,035. Ordinances 31,117 and 31,173 are identical, except the concluding section of the latter ordinance, which is as follows:

"Section 14. Inasmuch as this ordinance is necessary for the preservation of the public health, peace and safety of the City of Portland in this; The unemployed of the city are in need of immediate aid and relief and the reorganization of the Employment Bureau will probably give them such aid, therefore, an emergency is hereby declared and this ordinance shall be in force and effect from and after its passage by the Council."

Ordinance 31,117 having been repealed before it went into effect will not hereafter be considered.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Richards & Richards,* with an oral argument by *Mr. Oren R. Richards.*

For respondents there was a brief over the names of *Mr. Walter P. La Roche,* City Attorney, and *Mr. Henry A. Davis,* Deputy City Attorney, with an oral argument by *Mr. La Roche.*

McBRIDE, C. J.—1. It is very apparent that the office of directors of the Bureau of Public Employment is a substitute or continuation of the board of directors designated by Ordinance 31,173. The duties of these three directors were executive and administrative, made so by the ordinance itself. The duties of plaintiff were clerical and subject to the direction of the board. Classifying him on the civil service list as a superintendent did not give him any other or different authority or heighten his official stature. However he might be classified as to rank or salary, his duties were those of a subordinate working under the direction of the board.

The members of the board under Ordinance 31,173 were not required by the terms of the ordinance to be selected under civil service rules, and the provision last above cited indicates no intention that the directors of the bureau should be so selected. In fact the qualifications required indicate it was the intention of the lawmakers that the commissioner should choose with reference to particular and special qualifications, rather than to confine his selection from a list furnished by the civil service board, and based upon previous service in a position which, by the terms of the ordinance creating it, was largely clerical. It may also be noted in this connection, while there is nothing in the ordinance requiring the directors to be taken from the civil service list, Section 4 requires the necessary clerks to be selected subject to the civil service

provisions of the charter, thus indicating the legislative intent to enforce the civil service provisions of the charter as to persons appointed, as plaintiff was, to clerical positions and to directors appointed, as the old board was, with reference to peculiar qualifications for the executive and administrative duties imposed upon them.

2. The fact of plaintiff having been clerk of the board created by Ordinance No. 20,035, with the grade and title of superintendent, does not entitle him to be appointed director under the present ordinance. It is true the court found he performed substantially the same duties during his incumbency under the old board, as are required in terms to be performed by the directors provided for in Ordinance No. 31,173, or by any ordinance. In performing these duties he acted not upon his own initiative, but as the agent and servant of the board, and instead of being a "director" he was the person directed. The commissioner and the two directors provided for by Ordinance 31,173 occupy positions analogous to the councilman and the two members selected from the Manufacturers' Association and the Trades Council under the former ordinance, while plaintiff's relation would have been analogous to the office of clerk of the board thus constituted. While these analogies are not coincident in all respects, they may be said to exist in a general way in the two ordinances.

It may be observed that while Ordinance No. 28,011 classifies plaintiff as of the rank and grade of "superintendent," it nowhere defines his duties, which, under Ordinance No. 20,035, were of a clerical nature, neither does it profess to repeal any portion of Ordinance 20,035, but leaves plaintiff with the same duties and with the same restrictions as those prescribed in or im-

plied by the last-named ordinance. It also classifies Augusta Vehr as "assistant clerk" without providing for a principal clerk other than plaintiff. Indeed it may be at least doubtful whether the civil service board or the council could, under the pretext of classifying the positions then in existence, create a new office with duties and powers different from those conferred by the ordinance creating the office in the first instance, and designate the incumbent of such new office.

3, 4. In its final analysis Ordinance 31,173 is merely a revision or amendment of Ordinance 20,035. It does no more than change the name of the bureau and increase the scope of its labors. The general plan and duties of the two boards are practically identical. Conceding for the purpose of this discussion that the office of director in the ordinance first above named is identical with the alleged office of superintendent named in the ordinance last recited, which is the essence of plaintiff's contention, he was not legislated out of his office by virtue of the fact that the name of the office had been changed and the scope of its duties enlarged. Upon that theory there was no break in the continuity of the bureau, merely a change of its name and the name of the officer from superintendent to director, in which case the plaintiff would continue to hold the office under a new title. Having been removed by the mayor, he would, if such removal were wrongful, still have a substantial right to the office under its new name, which right would be lost only by failure to appeal, as prescribed by Section 108 of the charter. This he failed to do; therefore, upon his own theory he is out of court. The writer, however, is of the opinion that plaintiff's true status, notwithstanding the brevet title and grade given him in the classification ordinance, was clerical, that he was as a matter of

law clerk of the Free Employment Bureau and remained clerk of the Public Employment Bureau, subject to the order of removal. If the action of the commissioner should be reversed upon appeal to the civil service board he would remain clerk of the Public Employment Bureau; if the removal should be sustained, he was effectually barred.

5. Counsel for plaintiff in their very able and ingenious brief lay stress upon Section 109 of the charter, which is as follows:

"Section 109. SUSPENSIONS REDUCTION OF FORCE. Any appointing authority may suspend a subordinate for a reasonable period not exceeding thirty days, but such suspension if occurring more than once a year shall be deemed a removal and subject to investigation in like manner. But if at any time, the Council or other city authority shall abolish any office or employment, or reduce the number of employees, discharges shall be made in the inverse order of appointment, and if such offices or places shall again be created or reinstated, the employees so removed (except as to emergency employees) shall have preference for reappointment in the order of their original appointment."

Their argument is, that by Ordinance 31,173 the office of the superintendent of the Free Employment Bureau was abolished; that it has again been recreated or reinstated and, therefore, plaintiff is entitled to preference for reappointment. The answer is that Ordinance 31,173, which creates the Public Employment Bureau, also repeals the ordinance creating the Free Employment Bureau. There is but one ordinance on the subject and it is to be considered as a whole, and so considered it must be held that the Bureau was never abolished. If an ordinance professes to abolish an office in one clause and to reinstate

it in another, it follows logically that the office has never been abolished in fact, and that there has been no break in the continuity of the term of the official holding it. So, whether we call plaintiff a superintendent or clerk he was never out of his position by virtue of the passage of Ordinance 31,173, but lost it by failure to appeal from the order of removal, as required by Section 108 of the charter. The contention of plaintiff, when reduced to its lowest terms, seems to be that his position was abolished so far as his right to appeal was concerned, but remained in existence for the purpose of reinstatement. This is wholly illogical and unsound in law. We have no doubt plaintiff had a perfect right to appeal to the civil service board from the order of the commissioner removing him from his position, and this right existed notwithstanding the passage of Ordinance 31,173; and that if he had so appealed and his appeal had been sustained by the civil service board, he would have been entitled to reinstatement to a corresponding position in the Employment Bureau, as it existed under the provisions of the revised ordinance. He failed so to appeal and his removal was therefore final.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

BEAN, JOHNS and HARRIS, JJ., concur.

Argued May 22, affirmed September 24, 1918.

FRANCONI *v.* GRAHAM.

(174 Pac. 548.)

Work and Labor—Quantum Meruit—Issues—Rescission.

1. Contention that complaint, based on *quantum meruit* and showing there was written contract, is fatally defective for absence of allegation of rescission, is untenable, where answer pleads abandonment of contract by plaintiffs, and reply admits same and justifies it; allegations sufficiently raising issue of rescission.

Appeal and Error—Harmless Error—Evidence.

2. In action for cutting cordwood, error in admitting testimony as to reasonable value of plaintiffs' services was harmless where court evidently disregarded it, and properly adopted contract price as reasonable value of work.

Appeal and Error—Review—Credibility of Witnesses.

3. Supreme Court cannot go into question of credibility of witnesses.

Appeal and Error—Review—Weight of Evidence.

4. The Supreme Court cannot go into the question of the weight of the evidence.

Work and Labor—Breach of Contract—Quantum Meruit.

5. When contract for services provides for payments at specified intervals, and installments are not paid when due, aggrieved parties may abandon work and recover on *quantum meruit*.

Election of Remedies—Necessity of Pleading.

6. Prior election of inconsistent remedy by plaintiff being a bar, and therefore affirmative defense, to be available to defendants, it must be pleaded, and cannot be predicated on original complaint in evidence declaring for breach of contract, which plaintiffs amended to recover on *quantum meruit*.

Work and Labor—Prior Breach by Plaintiffs—Effect.

7. Where contract for cutting cordwood provided plaintiffs should have 1,200 cords cut by March 1st, and they failed to comply, but defendants did not object, in plaintiffs' action for services after defendants' subsequent breach, plaintiffs can recover.

Costs—Services of Interpreter.

8. Section 855, L. O. L., requires intervention of interpreter in case where witness does not understand English language. An item in judgment for services of interpreter under such circumstances was proper as a necessary disbursement.

[As to the proper method of examining a witness through an interpreter, see note in Ann. Cas. 1912B, 726.]

From Multnomah: ROBERT G. MORROW, Judge.

Department 2.

The complaint upon which this action was tried in the lower court is labeled "second amended complaint," and contains two counts. The first of these alleges that between the first day of November, 1916, and the twentieth day of April, 1916, the plaintiffs, at the special instance and request of the defendants, rendered services to defendants which consisted of cutting and piling 1,481¾ cords of firewood, and that such services are reasonably worth the sum of $1,259.49; that $621.78 has been paid thereon, leaving a balance due of $637.71 for which judgment is asked.

The second cause of action pleads a written contract between plaintiffs and defendants for cutting the wood, from which it appears that it was agreed that whenever plaintiffs had cut and piled 200 or more cords of wood, the defendants should, upon notice of the fact, proceed at once to measure and receive such installment and pay plaintiffs 75 per cent of the amount due thereon, withholding the remainder until the completion of the work under the contract. It is then alleged that on April 9, 1916, plaintiffs notified defendants that they had more than 200 cords of wood ready for measurement and acceptance, and demanded that it be measured; that defendants neglected to measure or pay for the same in accordance with the terms of the contract; that defendants were again notified about April 16th, but still neglected and refused to comply with the terms of the agreement, and that on or about April 20th, being unable to maintain their camp, for want of the money then due them, plaintiffs abandoned the work. They then aver that

if they had not been compelled, by the default of defendants, to abandon the work, and had completed the same, they would have been entitled to receive therefor the sum of $2,040; that they have been paid thereon the sum of $621.78, and in order to receive the balance of $1,418.22, they would have been obliged to expend $320. They therefore pray judgment on their second cause of action in the sum of $1,098.22, as anticipated profits.

Defendants answer the first cause of action by a general denial and affirmatively rely upon the written contract mentioned in the complaint, and allege:

"That in April, 1916, the plaintiffs, without cause or justification, willfully and deliberately broke and repudiated the said contract, and refused to further perform the terms thereof. At the time of such repudiation by the plaintiffs, the said contract was in large measure unperformed, and the plaintiffs in order to perform, were still required to cut and pile upwards of 920 cords of wood; that the breach of said contract by the plaintiffs greatly damaged the defendants. That defendants paid to the plaintiffs all that the plaintiffs were entitled to receive, and all that defendants justly owed to the plaintiffs; and that plaintiffs have been fully paid for whatever work and services they rendered under and by virtue of the said contract, Exhibit 'A.'"

Answering the second cause of action, defendants again appeal to the written contract, alleging that they never refused to measure or accept the wood; that all of it was then measured and accepted except about 60 cords, which was not piled near the rest, and was inconveniently located, so defendants proposed to accept the measurements or estimates of plaintiffs, subject to future adjustment. It is then averred that prior to the time when the last quantity of wood was

measured, plaintiffs had decided to quit and repudiate their contract, and at the time of the measurement they informed defendants that they were quitting and demanded full payment for all wood cut, refusing defendant's offer of the percentage due under the contract. These allegations are followed by a counterclaim in which it is alleged that in April, 1916, plaintiffs, without any cause or justification, repudiated the contract and ceased to perform their part thereof, for which breach they ask for damages in the sum of $750.

A reply was filed, in which plaintiffs reiterate the allegations of the complaint regarding the neglect of the defendants to measure, accept, and pay for the wood cut and piled in April. Upon the trial, defendants called upon plaintiffs to elect as to which of their causes of action they would rely upon, assuming them to be inconsistent, and plaintiffs thereupon abandoned their second cause of action.

The case was tried without a jury and there was a judgment for plaintiffs, from which defendants appeal.

AFFIRMED.

For appellants there was a brief over the name of *Messrs. Clark, Skulason & Clark*, with an oral argument by *Mr. M. H. Clark.*

For respondent there was a brief and an oral argument by *Mr. George L. Masten.*

BENSON, J.—1. The first assignment of error challenges the sufficiency of the complaint, upon the theory that since the complaint is based upon *quantum meruit*, and it appears from both complaint and reply that there was a written contract, the absence of an allegation of rescission renders the pleading fatally

defective. This contention is not tenable, since the answer pleads the abandonment of the contract by plaintiffs and the reply admits the same and justifies it by pleading the failure of the defendants to measure, receive and pay for the wood in accordance with the terms of the contract. These allegations sufficiently raise the issue of rescission so far as it may be of importance herein: *Crown Cycle Co.* v. *Brown,* 39 Or. 285 (64 Pac. 451).

2. The next three assignments are directed to the alleged error of the court in admitting the testimony of certain witnesses as to the reasonable value of the services rendered by plaintiffs. It is needless to discuss the questions thus presented, since the court evidently disregarded all of it, and very properly adopted the contract price of the work as the reasonable value thereof, and the error, if any, was harmless: *West* v. *Eley,* 39 Or. 461 (65 Pac. 798).

3, 4. At the close of plaintiffs' case defendants moved for a judgment of nonsuit on the ground that no cause of action had been established, and particularly, that there had been no proof of a rescission of the written contract. The reply alleges a breach of the contract, in that the defendants failed and refused to measure, accept and pay for a quantity of the wood cut, at the time and in the manner provided therein; that plaintiffs thereupon abandoned the work and notified defendants of the fact. So far as rescission may be a feature of this case, the pleadings sufficiently allege it. There is evidence in support of these statements in the record, and the trial court made findings in accordance therewith. This court cannot go into the question of credibility of the witnesses, or the weight of the evidence.

5. The position of the plaintiffs to the effect that when a contract for services provides for payments thereon at specified intervals and the installments are not paid when due, the plaintiffs may abandon the work and recover upon *quantum meruit* for the work already performed, is well established by the authorities: *Dobbins* v. *Higgins,* 78 Ill. 440; *Bean* v. *Miller,* 69 Mo. 384; *Grand Rapids etc. R. Co.* v. *Van Dusen,* 29 Mich. 431; *Peet* v. *East Grand Forks,* 101 Minn. 518 (112 N. W. 1003); *Dyer* v. *Middle Kittitas Irr. Dist.,* 25 Wash. 80 (64 Pac. 1009).

6. It is next urged that the action of plaintiffs in filing the original complaint herein, basing their right to recover upon the contract and its breach, and subsequently amending the same and seeking to recover upon *quantum meruit* amounts to an irrevocable election of remedies, constituting a bar to their recovery upon the latter. Whether or not it is a bar under the facts of this case, we do not decide, for the question thus presented is not made an issue in the pleadings upon which the case was tried, and the original complaint is here, simply as a matter of evidence, although for what purpose it was introduced does not clearly appear. It is not the pleading upon which the plaintiffs are relying, and since the prior election of an inconsistent remedy is a bar, and therefore an affirmative defense, we are of the opinion that to be made available it must be pleaded.

7. It is then contended that since the contract provided that the plaintiffs should have 1,200 cords of wood cut and piled by the first day of March, and that they had failed to comply therewith, therefore they were themselves in default, and consequently in no position to complain of defendants' subsequent breach of the agreement. The defendants have not pleaded this

default, and when upon the witness-stand the defendant Graham testified as follows:

"I asked him when we came to measure it up, after passing the time of the day, what he was going to do about the wood, if he didn't have the amount of wood cut. He said it remained to be seen how much wood they had cut. After we had gotten it figured up, I spoke to him again about it, only in a joking way more than anything else, and I asked him what he was going to do about the amount of wood lacking to make up that twelve hundred cords, and he said, 'What are you going to do about it? I suppose first we should see what you can do something with us,' and I passed it off by saying that we had put that in there in order to get the wood along as fast as we could; in order to get it done, and that they had done the best they could, and we were willing to let it go."

Under these circumstances the trial court very properly ignored the subject of the plaintiff's default, except that a finding was made as follows:

"That by the terms of said contract, 1,200 cords of wood were to be cut and piled by the plaintiffs on or before March 1, 1916. That the plaintiffs defaulted in the performance of these provisions of the contract and on said March 1, 1916, had cut several hundred cords less than the quantity stipulated in the contract, but neither party has ever made or now makes any claim or demand against the other because of such default."

It is also urged that error was committed in denying a judgment to defendants upon their counterclaim, but since this demand is based upon the wrongful abandonment of the work by plaintiffs, and the findings are to the effect that such abandonment was not wrongful, nothing further need be said in relation to it.

8. Defendants also appeal from the judgment of the trial court allowing an item of $5 for the services of an interpreter as a necessary disbursement. Section

855, L. O. L., requires the intervention of an interpreter in cases where the witness does not understand the English language, and the item was properly allowed.

We find no error in the record and the judgment is affirmed. AFFIRMED.

BEAN, MOORE and HARRIS, JJ., concur.

Argued July 25, affirmed October 1, 1918.

SHEPPERD *v.* HOLMES.

(174 Pac. 530.)

Appeal and Error—Equitable Proceedings—Remand.

1. Where the proceeding is equitable, and the testimony has all been taken, and is before the court on appeal for trial *de novo*, the cause will not be remanded for new trial.

Execution—Sales for Inadequate Consideration—Setting Aside Sheriff's Deed.

2. In suit to set aside sheriff's deed issued to purchaser at execution sale and permit judgment debtors to redeem, facts *held* to justify decree for plaintiffs, there having been no serious attempt to levy upon personalty before resorting to land which, though worth $4,000, was sold for $262.75.

[As to inadequacy of price as ground for setting aside judicial sale, see note in Ann. Cas. 1914D, 3.]

From Multnomah: HENRY E. MCGINN, Judge.

Department 2.

This is a suit to set aside a sheriff's deed, and permit the judgment debtors to redeem. It appears from the pleadings and the evidence that on November 1, 1911, the plaintiff J. H. Shepperd was indebted to the defendant Holmes, and to secure the payment of the debt executed three promissory notes, in which his father, the plaintiff George Shepperd joined. Two of

these notes were for the sum of $90 each, and the third was for the sum of $82.45. Payments were made thereafter, which reduced the amount due upon the notes to $178.40, for which amount, together with interest and costs, a judgment by default was obtained by Holmes, in the Justice's Court, on September 14, 1912, and thereafter this judgment was docketed in the Circuit Court, and on August 7, 1913, an execution was issued thereon, and on September 8, 1913, the real estate in controversy, being the property of the plaintiff George Shepperd, was sold by the sheriff for the sum of $262.75, the amount then due, including the expenses of the sale, and the judgment satisfied. A sheriff's deed was executed to Holmes as the purchaser on September 21, 1915. The further facts are stated in the opinion. The trial court entered a decree for plaintiffs and defendants appeal. AFFIRMED.

For appellants there was a brief over the names of *Mr. Henry D. Story, Mr. John Ditchburn* and *Messrs. Woodward & Orth,* with oral arguments by *Mr. Story* and *Mr. Ditchburn.*

For respondents there was a brief over the names of *Mr. Estes Snedecor* and *Mr. Trafton M. Dye,* with an oral argument by *Mr. Snedecor.*

BENSON, J.—1. At the outset, defendants complain very bitterly of the action of the trial court in declining to hear the testimony submitted by them. The record discloses that after a portion of the plaintiffs' evidence had been introduced, the trial judge announced that in his opinion, the real estate had been sold at so small a percentage of its market value as to render the transaction unconscionable, and that in any event he would enter a decree setting aside the deed and permitting

plaintiffs to redeem. He then suggested that they might proceed with the taking of testimony before the official court reporter, and thus make up a record, while he should proceed to a consideration of other matters. This was done, and a complete record is now before us. Defendants call our attention to the case of *Witt* v. *Campbell-Lakin Segar Co.,* 66 Or. 144 (134 Pac. 316), and contend that upon the doctrine there announced, we should remand the cause for a new trial. There is, however, a marked difference between the present case and the one cited. That was an action at law, while this is an equitable proceeding. The testimony was all taken and is now before us for a *de novo* trial. No good purpose would be served by sending it back to have the same work all done over.

2. Considering the case upon its merits, then, the evidence discloses that no serious attempt was ever made to levy upon the personal property of the debtors, although the judgment creditor unquestionably knew that the debtors had sufficient personal property to satisfy the judgment. It appears from the testimony of the deputy sheriff that all directions of the parties in regard to levies upon execution are kept on file in the sheriff's office and that a written instruction from the defendants herein to levy upon the real estate therein described, is the only record now in that office, a certified copy of which is in evidence. Defendant Orth testifies that he did ask for a levy upon personal property, and that the sheriff informed him that it was not the custom of his office to search for assets of that nature, and that if the applicant desired such a levy he must point out the property to be seized, and he thereafter directed the levy upon the real estate, without making any effort to locate any chattels. George Shepperd, the owner of the land so sold, did not dis-

cover the fact of the sale until he read in the daily papers of the execution of the sheriff's deed. It is quite clearly established that at the time of the sale the land was worth $4,000. It also develops that after the sale, the defendant Orth, acting as attorney for Holmes, continued to press the younger plaintiff for payments on the judgment, explaining to him that Holmes had a lien upon the father's land, which could be guarded against by paying the judgment and costs with 6 per cent interest; that J. H. Shepperd, in an effort to accomplish this, took some choses in action to Orth, and asked him to collect them and apply the proceeds thereof to the payment of the judgment. Orth accepted the employment, made some collections thereon, and notified Shepperd that after deducting his charges for collection, the remainder had been applied as directed, but said nothing about "redemption," a phase of the law in relation to which Shepperd was totally ignorant. On August 10, 1914, J. H. Shepperd paid $25 to Holmes in person, whose receipt specified that the payment was "to apply on old notes." These payments aggregated a little more than $100, and before bringing this suit plaintiffs tendered to the attorney for Holmes the balance due on the judgment and insisted that they be permitted to redeem. This request being refused, this litigation followed.

The state of facts above set out clearly justifies the decree of the lower court: *Schroeder* v. *Young,* 161 U. S. 334 (40 L. Ed. 72, 16 Sup. Ct. Rep. 512); *Arnold* v. *Ness,* 212 Fed. 290; *Graffam* v. *Burgess,* 117 U. S. 180 (29 L. Ed. 839, 6 Sup. Ct. Rep. 686).

The decree is affirmed. AFFIRMED.

McBRIDE, C. J., BEAN and JOHNS, JJ., concur.

Argued September 17, affirmed October 1, 1918.

HAYES *v.* HAYES.

(174 Pac. 579.)

Specific Performance—Oral Contract to Convey Realty—Proof—Sufficiency.

1. In suit for specific performance of oral contract to convey realty, it is required first that the contract itself be clearly proved; the remaining question being whether there has been sufficient showing of part performance to take the case out of the statute of frauds.

Specific Performance—Proof of Contract—Sufficiency.

2. In suit by plaintiff to enforce against the other heirs and administrator of his deceased father a parol agreement by deceased to convey to plaintiff 50 acres of land, *held*, that oral contract to convey was sufficiently proven.

Frauds, Statute of—Oral Contract to Convey—Evidence.

3. Possession relied upon to take the case of an oral contract to convey out of the statute of frauds must be marked and certain, and referable only to such contract.

Wills—Contract to Devise Realty—What Constitutes—"Give."

4. Even if father said to his son, "I will give you 50 acres, if you will work for me until the farm is paid for," where the son accepted the offer and performed the work, the result would be a contract; the use of the word "give" not showing purpose of father to make a will.

Frauds, Statute of—Part Performance of Oral Contract to Convey Realty—Evidence.

5. Where father offered his son a farm, provided the son would work for him until the farm was paid for, part performance, sufficient to take the case out of the statute of frauds, would be established by the son's performance of labor, taking possession of and making permanent improvements on farm, and the father's marking out the line of division and building fence on boundary.

Specific Performance—Oral Contract to Convey—Defense.

6. In suit by plaintiff to enforce against other heirs and administrator of his father a parol agreement to convey 50 acres of land, it was no defense that before bringing suit plaintiff had offered to convey his interest in remainder of father's estate, if defendants would transfer to him all possible interest in the 50 acres.

[As to certainty in contract as requisite for specific performance, see note in 26 Am. Dec. 661.]

From Linn: GEORGE G. BINGHAM, Judge.

Department 1.

This is a suit whereby the plaintiff seeks to enforce against the other heirs and the administrator of his deceased father a parol agreement said to have been made by the latter to convey to the plaintiff fifty acres of land. The substance of his complaint is as follows: In 1901 the father purchased a 250-acre farm in Linn County, upon which he paid all the purchase price but $1,000, and agreed with the plaintiff at the time that if the latter would remain upon the farm and contribute his labor in its necessary management and cultivation until it was fully paid for, he would convey to the plaintiff fifty acres thereof as his compensation. The plaintiff claims to have fully performed the contract on his part by working on the farm until the remainder of the purchase price was fully discharged and in pursuance of their stipulation his father set off to him fifty acres out of the north and west part of the large tract, and he went into possession thereof under the contract, built a house on his land thus designated and made other improvements and lived there for a time. He then took employment elsewhere, agreeing with his father that the latter should have the use of the land in consideration of his paying the taxes thereon until the son should want possession of it again. A few years later he returned, and at his father's request made an exchange with him, giving up the first fifty acres and taking in lieu thereof a like area from the north end of the original 250-acre tract. With his parent's consent and approval he moved the house mentioned from the first tract to the new one, built on the latter a new barn and other improvements of considerable value and remained in possession, living thereon with his family continuously thereafter.

His father died suddenly on June 10, 1916, without having made the deed, although the son had asked him for a conveyance. After his father's death the plaintiff demanded a deed from his brother and sisters, but they refused to execute one, and hence this suit.

The relationship of the parties, the death of the father, the appointment of the elder son, J. L. Hayes, as administrator, are all admitted, but the remainder of the complaint is denied. The defendants allege that there was no contract made between the plaintiff and his father. They state that he was anxious to have his children living near him and that in pursuance of that desire he allowed the plaintiff to go upon the piece of land mentioned, requiring him to pay a small rent therefor, that he followed the same course with his other son and his unmarried daughter, Huldah Hayes, and that the only occupancy that either of them had of any of the land was that of a mere tenant at a nominal rent.

This in turn is denied by the reply. The Circuit Court heard the case and entered a decree according to the prayer of the complaint. The defendants appeal. AFFIRMED.

For appellants there was a brief over the names of *Messrs. Weatherford & Weatherford* and *Mr. A. A. Tussing,* with oral arguments by *Mr. James K. Weatherford* and *Mr. Tussing.*

For respondent there was a brief over the name of *Messrs. Hill & Marks,* with an oral argument by *Mr. Gale S. Hill.*

BURNETT, J.—This litigation is an example of the too frequent outcome of lax methods of business between near relatives, but however unwelcome the task,

we are compelled to give consideration to the case and decide it as we would any other of the kind. At the outset we must remember that we are not administering upon the estate of the deceased father; neither are we enforcing a contract between the son and his father for the latter to make a will in favor of the former. The issue is joined upon the question of whether they entered into the contract mentioned in the complaint, and we are to determine the matter on the same principles as if they had up to that time been utter strangers.

If the father and son did anything, they contracted with each other, the former to sell and the latter to buy land in the first instance, and later on to exchange tracts, and it is for us to ascertain from the record whether such an oral agreement was made, and if so, whether there has been such part performance thereof as to take it out of the statute of frauds and to authorize the court to compel the remainder of the performance so as to work out a complete execution of the agreement actually made. The question is thus stated on the general issue because there is no testimony whatever tending to show that the plaintiff occupied any land in the tract at a nominal rent, as stated in the answer.

1, 2. The principles governing a dispute of this kind are well settled. The difficulty in this, as in most other cases of the sort, is the question of fact. It is required, first, that the contract itself be clearly proved, this being the foundation of the whole matter, and the remaining question to be determined is whether there has been sufficient showing of part performance. The plaintiff is well supported in his contention that there was an agreement of the kind alleged in his complaint. Indeed, throughout the testimony on the part of the

defendants there is a vein clearly indicating that the plaintiff had a substantial claim of some kind upon the particular tract in question. The obvious effort of the defendants by their testimony is to show that the design of the father was ultimately to devise certain lands to each of his children, but that his intention was never carried out. On the other hand, the showing is very clear to the effect that the father made the agreement and that after the place was fully paid for in pursuance thereof he designated to the plaintiff a certain tract which he should have for his own, allowed him to go into possession thereof, build himself a dwelling thereon and to live there, and later on exchanged tracts with him, permitting him to move the house from its first site to the new one on the north end of the place, to build a barn and to make other improvements thereon, and not only so, but also himself measured on one side of the farm from the northwest corner and directed his elder son to go with the plaintiff and measure on the other side from the northeast corner, so as to establish the corners on the south, had his elder son also plow a furrow across from one side of the place to the other, between these southern corners so fixed, and designated it as the south boundary line of the plaintiff's land. Even further, the father built his own half of the division fence between the fifty-acre tract on the north thus set off to the plaintiff and the remainder of the farm, and the son was engaged in building his half when his father died. The effort to belittle all these things into a mere tenancy at will and to show a mere probable plan of the father to devise the premises to the plaintiff, is against the strong preponderance of the testimony.

3–5. The argument that this solution of the question would give the plaintiff an advantage over the other

heirs in the distribution of the father's remaining estate is not by the mark. It does not meet the question made by the pleading. The father had a right to make such a contract with the plaintiff and that is what we are called upon to adjust. It was the father's option to contract or not with his other children. This agreement between him and the plaintiff is not to be taken as a distribution of his estate. As contracting parties, the son and the father occupied the same position in respect to each other as if they had not been related by blood, and the cause must be so determined. The case is to be distinguished from the early case of *Brown* v. *Lord,* 7 Or. 302, 307, wherein the testimony was contradictory as to the particular tract of land that the son was to have. Besides this, there was no marked change of possession in that instance. Some witnesses said that the father, Brown, was to give all his land unreservedly to the son, others claimed that the father was to keep forty acres, including the residence and other buildings, and still others claimed that he was only to retain a life estate in the whole property. Under these circumstances this court held that the testimony was not sufficiently clear and definite to establish the contract. To all outward appearances, also, the mode of living on the Brown place was the same that it had always been. In that respect the general rule is that the possession relied upon to take the case out of the statute must be marked and certain and referable only to such a contract. In the case at bar all was done that practically could have been done to set off and designate the premises, short of a survey by a professional surveyor. There is no potency in the argument that the use of the word "give" in speaking of the transaction declares the purpose of the father to make a will. If A should say to B, "I will give you $50 if you will deliver to me ten

cords of wood by October 1st next following,'' and B should deliver the wood according to the statement, the result would be a contract. And so here, even if the father said those words, ''I will give you fifty acres of land if you will work for me until the farm is paid for,'' and the son accepted the offer and performed the work according thereto, the result is just the same, a contract. The part performance is established by the son's performing the labor, then taking possession of the land, making permanent improvements thereon, and the father's marking out the line of division and building his fence on the boundary.

The issue is governed by such cases as *Barrett* v. *Schleich,* 37 Or. 613 (62 Pac. 792). Further citation of precedents in this state is unnecessary. The principles are well settled. The cases are in harmony; they turn uniformly upon a question of fact and the sufficiency of acts of the parties to amount to part performance.

6. In the argument of the defendants much stress was laid upon the fact that before commencing this suit the plaintiff offered to convey to the defendants his interest in the remainder of his father's estate if they would join in transferring to him all their possible estate in the fifty acres he claims in this litigation. He had the privilege of thus attempting to buy his peace without prejudice to his actual rights and the defendants have no cause of complaint if, having rejected the olive branch of compromise, they perish by the sword of specific performance.

The decision of the Circuit Court, which had the opportunity to observe the witnesses and more efficiently estimate the value of their testimony, must be affirmed. AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued June 28, reversed October 1, 1918.

TURNIDGE v. THOMPSON.

(175 Pac. 281.)

Electricity—Insulation.

1. Laws of 1911, Chapter 3, Section 1, providing that one controlling the transmission of electricity must insulate the wire at all points where the public are liable to come in contact with it, does not require insulation on a wire, properly attached to poles, at a point 30 feet from a pole.

Statutes—Title—Initiative.

2. Article IV, Section 20, of the Constitution, providing that every act shall embrace but one subject, etc., applies to an act adopted by the people in the exercise of the power of the initiative.

Statutes—Construction—Title.

3. Since every act must have a title expressing the subject matter, the title necessarily becomes a part of the act, and offers valuable help in construing the act and determining the legislative intent.

Electricity—Operation of Employers' Liability Act—"Public."

4. Employers' Liability Act, Section 1, providing that persons transmitting electricity shall insulate wires at points where public may come in contact with them, does not give a member of the public a right of action, unless he is an employee, or is engaged in a hazardous employment; the word "public" relating only to criminal liability under the act.

[As to what is "accident arising out of, and in course of, employment" within Employers' Liability Act, see note in Ann. Cas. 1914D, 1284.]

From Yamhill: HARRY H. BELT, Judge.

Department 2.

Joseph P. Turnidge met his death by coming in contact with an electric wire, charged with 2,300 volts of electricity, and his widow Nellie E. Turnidge brought this action against J. T. Thompson and a corporation known as the Sheridan Light & Power Company. A judgment of nonsuit eliminated the Sheridan Light & Power Company, but the plaintiff was awarded a verdict and judgment against Thompson, and he appealed.

Joseph P. Turnidge was killed while passing over a field which embraces between 50 and 70 acres, is owned by Amos Fuqua and was occupied by F. B. Leslie as a tenant. The Fuqua premises are bounded on the west by the Willamina River, on the east and on the north by a county road and on the south by a fence. There is a fence along the line between the field and the county road; and hence the premises are inclosed by a fence along the north, east and south lines, and by a river on the west. There is a fringe of brush and timber along the east bank of the river.

J. R. Fagerstrom owns a farm on the west side of the Willamina River and opposite the Fuqua premises. The house and barn on the Fagerstrom farm are located in a northwest direction from the southwest corner of the Fuqua premises. The defendant J. T. Thompson owns an electric light plant in Willamina about two miles in a southerly direction from the Fuqua property. Thompson maintains a transmission line which extends from his plant in Willamina along the county road to and past the Fuqua premises. This is a main line and is located on the east side of the county road which bounds the Fuqua premises on the east and on the north. F. R. Fagerstrom maintains electric lights in his house and barn and the electricity for the lights is carried through a wire which is connected with the main line in the county road at a point directly opposite the southeast corner of the Fuqua premises. The line to the Fagerstrom farm is supported by poles with cross-arms into which are screwed wooden pegs. Glass insulators are placed upon these wooden pegs and the wire is fastened around the insulators. Commencing at the southeast corner of the Fuqua premises the poles for the Fagerstrom wire are set along the south line fence until

the tenth pole is reached; from pole No. 10 the line is carried in a northwesterly direction towards the Fagerstrom house and barn, thus cutting off the southwest corner of the Fuqua premises. Pole No. 11 is near the edge of the brush which fringes the east bank of the river.

It will be recalled that the Fuqua property is bounded on the north by a county road. As this road continues towards the west, it passes a schoolhouse near the northwest corner of the Fuqua property, crosses a bridge which spans the river, and then passes a farm residence where Joseph P. Turnidge lived with his family. The Turnidge house is located a short distance west of the bridge and on the south side of the county road. "On the evening" of March 26, 1917, the decedent went "across the bridge and between the schoolhouse and the river along the bank and down through the Fuqua place." Alarmed at the failure of her husband to return, the plaintiff caused two of her neighbors to search for him. About 7 o'clock that evening the neighbors found the lifeless body of Turnidge lying across the Fagerstrom wire at a point between pole No. 10 and pole No. 11 and about 30 feet east of pole No. 11. The burns on his hands and chest proved that his death was caused by coming in contact with the wire. When the body was removed the wire immediately raised up about four feet from the ground. The next morning it was ascertained that the wooden peg that had been set in the cross-arm on pole No. 11 had broken off on account of decay and that a bracket nailed to a tree which served as pole No. 12 had broken loose, thus releasing the line from poles 11 and 12 and permitting the wire to sag so that at the place where Turnidge was killed the wire hung only about four feet from the ground.

There was a trespass notice posted on a tree near the southwest corner and a like notice posted at the southeast corner of the Fuqua premises. The notices were printed and read thus:

"We the undersigned do HEREBY FORBID any trespassing or HUNTING on our premises. THIS MEANS YOU."

The names of Amos Fuqua, F. B. Leslie and six other persons were printed on the notices. Leslie appeared as a witness and testified that the purpose of the trespass notices "was to keep hunters off"; and when asked: "Did that [the notices] apply to people who lived up in that country?" he answered: "It never applied to our neighbors, never seemed to me"; and the succeeding question and answer are as follows:

Q. "Was that generally understood in the neighborhood? A. Amongst what neighbors was there, I couldn't tell who was there, I know several of us talked it over."

Homer Holman, one of the neighbors who found the body, testified that there is a "trail or byway" along the course that he took "in following up the trail of Turnidge" and that such trail crosses the fence on the south side of the Fuqua land "just below" an ash tree which would be about midway between poles 10 and 11 if pole 11 were on the fence line instead of north of it. Ben Richards stated that "the neighbors living there had an opening down through there, a little cut to town, and if they wanted to go through there they went through there on foot." Fred Churchman testified as follows:

"It seemed to be the custom of people, seems to be a cut-off, and a good many people go down past there and turn down the creek by De Lashmutts and out on

the road again, save a good deal, and a good many people went through there."

The plaintiff explained to the jury that she had seen strangers as well as neighbors leave the road at the bridge and start down on the east side of the river "along the edge of the field in the Fuqua place." The defendant and Albert E. Shinkle both testified that there were no indications of a trail or foot-path near the place where Turnidge was killed and Leslie swore that there was no trail "on that edge" of the Fuqua property; that "we plow right up to the river" and that the ground at the point where Turnidge was killed "had been cropped off the year before, that fall." There is no gate at or near the southwest corner of the Fuqua property. On the south side of and adjacent to the fence along the south boundary of the Fuqua premises is a ditch, called by one witness "a wet weather ditch." Opposite the place of the accident the ditch is about 10 feet deep and about 12 feet wide "at the top," although by going "down in the ditch you can step across the water and up on the other side." The ditch has no "foot-rail or crossing place." REVERSED WITH DIRECTIONS.

For appellant there was a brief with oral arguments by *Mr. W. O. Sims* and *Mr. Oscar Hayter.*

For respondent there was a brief over the names of *Mr. Frank Holmes* and *Messrs. Heider & Mark,* with an oral argument by *Mr. Holmes.*

HARRIS, J.—The plaintiff claimed that the defendant Thompson owned and controlled the line from the county road to the Fagerstrom premises. Thompson insisted that the line was owned and controlled by

Fagerstrom and that he, the defendant, should be exonerated from liability, on the theory that the electricity was delivered to Fagerstrom at the county road where connection was made with the main line and therefore the defendant would not be liable for anything occurring after the electricity passed the place of delivery. The question of ownership was raised by the pleadings and was submitted to the jury with appropriate instructions. There was evidence upon both sides of the question, and since the verdict of the jury necessarily involved a finding that Thompson owned and controlled the line to the Fagerstrom buildings we must assume, without further inquiry, that Thompson owned or at least controlled the line.

This case was tried by the plaintiff upon the theory that the facts brought it within the embrace of the Employers' Liability Act: Chapter 3, Laws 1911. At the time of his death the decedent was neither an employee of the defendant nor of any other person. The place was private property; it was not a county road, or public park or such like. Viewed in a light most favorable to the plaintiff the decedent was on the Fuqua property only by sufferance. It is true that trespass notices were posted on the premises and yet the decedent should not be deemed a trespasser for the reason that neighbors had been accustomed to cross the Fuqua property as a short cut to Willamina and, moreover, Leslie did not intend that the notices "applied to our neighbors." The question for decision is whether the Employers' Liability Act is applicable to the facts presented by the record; and since the question to be decided requires an examination of the statute we here set down the entire act together with its title.

"A BILL to propose by initiative petition a law providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks and other structures, or engaged in any work upon or about electrical wires, or conductors or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or about any machinery or in any dangerous occupation, and extending and defining the liability of employers in any or all acts of negligence, or for injury or death of their employees, and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employees against employers, and prescribing a penalty for a violation of the law.

"Be it enacted by the people of the State of Oregon:

"Section 1. All owners, contractors, subcontractors, corporations or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct, or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever, shall be carefully selected and inspected and tested so as to detect any defects, and all scaffolding, staging, false work or other temporary structure shall be constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded; and all scaffolding, staging or other structure more than twenty feet from the ground or floor shall be secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom, and all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, and all shafts, wells, floor openings and similar places of danger shall be inclosed, and all machinery other than that operated by hand power

shall, whenever necessary for the safety of persons employed in or about the same, or *for the safety of the general public,* be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power, and in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided *at all points where the public* or the employees of the owner, contractor or subcontractor transmitting or using said electricity are liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock; and generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, *any work involving a risk or danger to* the employees or *the public,* shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

"Sec. 2. The manager, superintendent, foreman or other person in charge or control of the construction or works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employee.

"Sec. 3. It shall be the duty of owners, contractors, subcontractors, foremen, architects or other persons having charge of the particular work, to see that the requirements of this act are complied with, and for any failure in this respect the person or persons delinquent shall, upon conviction of violating any of the

provisions of this act, be fined not less than ten dollars, nor more than one thousand dollars, or imprisoned not less than ten days, nor more than one year, or both, in the discretion of the court, and this shall not affect or lessen the civil liability of such persons as the case may be.

"Sec. 4. If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother, or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded.

"Sec. 5. In all actions brought to recover from an employer for injuries suffered by an employee the negligence of a fellow-servant shall not be a defense where the injury was caused or contributed to by any of the following causes, namely: Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery or appliances; the incompetence or negligence of any person in charge of, or directing the particular work in which the employee was engaged at the time of the injury or death; the incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; the act of any fellow-servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.

"Sec. 6. The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.

"Sec. 7. All acts or parts of acts inconsistent herewith are hereby repealed."

1. The duties which the Employers' Liability Act imposes upon an owner engaged in transmitting electricity are prescribed by Section 1 of the statute. An analytical outline of this section may be found in *Camenzind* v. *Freeland Furniture Co., Ante,* p. 158, 174 Pac. 139, and possibly an inspection of that outline may assist the reader in construing the statute. Turning to Section 1 it will be observed that, among other things, (1) an owner must see that all wood shall be carefully selected and inspected and tested so as to detect any defects; (2) full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor or subcontractor transmitting the electricity are liable to come in contact with the wire; and (3) all owners having charge of any work involving a risk or danger to the employees or the public shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb. We shall assume, without deciding, that the duty to select, inspect and test so as to detect defects applies not only to the work of installing a transmission line, but also to the use of the line after it has been permanently installed. If the line had not broken from its fastenings the point where Turnidge was killed would not have been a point where the public or employees of the owner were liable to come in contact with the wire; but when the wire fell from the poles and sagged towards the ground it presented points where persons were liable to come in contact with it. So long as the wire remained attached to the poles there was no duty to insulate the wire at a point 30 feet east of pole No. 11. The plaintiff contends, however, that since the wire was liable to fall, and when fallen persons were liable to come in contact with it, the owner was obliged to see that the wire

was insulated. While it is doubtful whether the Fagerstrom wire was such an one as the statute requires to be insulated at a point 30 feet east of pole No. 11, we shall nevertheless assume, without deciding, that the Fagerstrom line throughout its entire length was within the embrace of the statute. We shall assume, too, that the *omnibus* clause with which Section 1 is concluded imposes upon every owner of an electric line the duty to use every practicable device, care and precaution for the protection and safety of life and limb.

Having stated what, for the purposes of the discussion, we shall assume to be the abstract duties of the owner of an electric line, as enumerated by the Employers' Liability Act, our next inquiry is whether such owner owes any of those duties to a person situated as Turnidge was when he came in contact with the wire. In brief, the question is: Did Thompson owe Turnidge any of the duties prescribed by the statute, and if he did, is Thompson civilly liable for a violation of any of those duties? From the outset of our inquiry we must remember that the decedent was not an employee of the owner or of any other person; nor was he engaged in work on or about the line.

The plaintiff contends that the Employers' Liability Act is not confined to employees and persons engaged in work on or about the machinery, structures and places enumerated in the statute, but that the legislation also extends to and includes every member of the public. This contention made by the plaintiff is based upon the circumstance that the statute makes it the duty of the owner of a wire carrying a dangerous voltage of electricity to provide full and complete insulation at all points where *"the public or the employees"* are liable to come in contact with the wire.

The word "public" is also found in that part of the act which requires a system of communication whenever necessary for the safety of persons employed about machinery, not operated by hand power, or for the safety of *"the general public"*; and the term is again found in the *omnibus* clause making it the duty of every person having charge of a work involving a risk or danger, "to the employees or *the public*" to use every practicable device, care and precaution for the protection and safety of life and limb.

The defendant argues that the word "public" should be construed to apply only to those places where the people as a whole have a right to be or are expected to be, as for example, county roads, city streets, parks and the like. In the instant case it will not be necessary to attempt a definition of the word "public," or to try to mark the limitations of the term as used in the act; but we shall examine the statute in a light most favorable to the plaintiff, and assume, without deciding, that the term "public" included Joseph P. Turnidge, notwithstanding the fact that, by the mere sufferance of the owner, he was passing over an inclosed field which was private and not public property.

The statute imposes a twofold liability: one civil and the other criminal. Nowhere does the statute state in direct or express terms that a member of the public, who is not also an employee or a person engaged in work on or about a machine, structure or place specified by the act, shall have a right of action for damages. The Employers' Liability Act does not expressly confer upon the public or upon any person as a mere member of the public the right to sue for damages whenever injured. If a person who is simply a member of the public can claim the protection of the Employers' Liability Act and sue an owner of a trans-

mission line carrying electricity he has such right only because of the inferences and implications to be drawn and derived from the use of the word "public" in the three particulars already mentioned. The avowed purpose of the statute was to protect workingmen and working-women; and since the statute is remedial it should be liberally construed so as to accomplish its expressed purpose.

The statute was adopted by the people in the exercise of the power of the initiative. The petition was circulated under the direction of the Oregon State Federation of Labor and was filed with the Secretary of State by J. F. Cassidy, Secretary of the Oregon State Federation of Labor. Upon the authority of Section 5, Chapter 226, Laws 1907, the Secretary of State transmitted a copy of the measure to the Attorney General with a request that the latter prepare a ballot title. The Attorney General prepared a ballot title which reads as follows:

"A bill for a law requiring protection for persons engaged in hazardous employments, defining and extending the liability of employers, and providing that contributory negligence shall not be a defense."

J. F. Cassidy was notified of the form submitted by the Attorney General and the form was apparently satisfactory for it was printed upon the ballots submitted to the electorate. It will be noticed that this ballot title undertakes to advise the voters that they are to vote on a measure which (1) requires protection for persons engaged in hazardous employments and (2) defines and extends the liability of employers. The ballot title does not contain the slightest suggestion that the measure is designed to protect the public as such. Through its secretary J. F. Cassidy, the Oregon State Federation of Labor filed with the Secretary of

State an argument in support of the measure. This argument was printed in the voters' pamphlet as required by law and sent to every registered voter in the state. The argument is introduced with the following headline: "A Bill for the Protection of Laborers in Hazardous Employments." That the outstanding purpose of the measure was for the protection of workingmen and working-women is made plain and emphatic by the following excerpts taken from the argument:

"Oregon stands backward and almost alone in her failure to recognize that the injury or death of a workman is as much a part of the conduct of the business as the bursting of a boiler or breakage of the machinery and to prevent the death or injury of the workman should be as much a part of the cost of the business as the protection of machinery or replacing old with new. * * This bill does not ask so arbitrary and artificial a thing as that the laborers' wages be protected and guaranteed by law, but it does ask that the employer be compelled to use diligence in protecting the laborer as to his life and limb, while earning wages; that a safe place in which to work be provided and that ropes, chains, beams, machinery, etc., be properly tested before the workman is asked to risk his life with them. Surely this is a reasonable request. Ten per cent of electrical workers are killed. It is a more hazardous employment than war. The same may be said of workers on bridges and high steel frame structures."

The argument printed in the voters' pamphlet concludes with the declaration that the bill

"is not only inherently just in itself and such as no just man or humane man ought to complain of, but it is good policy for Oregon, if she expects to be an attractive home for intelligent workers."

2, 3. We have yet to examine the title of the act; but before doing so it is proper to call attention to Article IV, Section 20, of the state Constitution, which commands that:

"Every act shall embrace but one subject, and matters properly connected therewith which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The language of Article IV, Section 20, is "every act" and therefore whether a law be an act passed by the legislative assembly under the authority of Article IV, Section 1, of the state Constitution or whether it be an act adopted by the people in the exercise of the power of the initiative as permitted by the last-mentioned section of the Constitution, it must be entitled in conformity with the requirements of Article IV, Section 20. Moreover, since every act must have a title expressing the subject matter, the title necessarily becomes a part of the act and offers valuable help in construing the act and determining the legislative intent: *State* v. *Robinson,* 32 Or. 43, 46 (48 Pac. 357). The scope of the title may possibly be made clearer to the eye if the title is set down in the form of a diagram, accurately preserving, however, not only the wording, but also the punctuation:

A BILL TO PROPOSE BY INITIATIVE PETITION A LAW

providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks and other structures, in any work upon or about electrical wires, or conductors or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or in any or all acts of negligence, or for injury or death of their employees, and extending and defining the liability of employers and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employers against employers, and prescribing a penalty for a violation of the law.

4. The title informs us that the bill provides for the protection and safety of persons "engaged in" certain work and that the purpose is to extend the liability of employers to their employees; but the title does not contain the remotest intimation that the body of the bill makes the owner liable in damages to a member of the public who is neither "engaged in" any kind of work mentioned in the title nor an employee of certain persons. Measured by the rule announced in *State* v. *Shaw,* 22 Or. 287 (29 Pac. 1028), the title is not broad enough to confer a right of action upon a member of the public as such. It is true that the opinion in *Clayton* v. *Enterprise Electric Co.,* 82 Or. 149 (161 Pac. 411), contains language more sweeping than was necessary; but that case is to be distinguished from the facts in the instant case, for there, although not an employee of the Enterprise Electric Company, Clayton was nevertheless an employee of Carl Roe, the owner of the motor pump for which the defendant was furnishing electricity, and was engaged in work on and about the electric appliance that caused his death. Turnidge was neither a person engaged in work on or about the wire nor an employee of the owner of the wire. When measured by its title the Employers' Liability Act is broad enough, so far as it concerns an electric wire, to include both employees of the owner of the wire and also persons "engaged in" certain work as exemplified in *Clayton* v. *Enterprise Electric Co., supra,* but it does not go further and give a right of action to every member of the public. Moreover, aside from any constitutional limitation, it is manifest, for the reasons already pointed out, that it was not the intent of the act to confer a right of action upon every person who might be injured.

The conclusion which we have reached does not necessarily delete the words "the public" found three times in Section 1 of the act. The words "the public" retain their appropriate function in measuring the duty owing to those persons who are entitled to sue and also in determining the criminal liability of the persons enumerated in Section 3 of the act.

If any person is chargeable with negligence on account of the wire breaking from its fastenings there is, of course, a remedy for that negligence. The plaintiff brought this action in her individual capacity as the widow of the decedent; and therefore the judgment of the trial court is not only reversed, but the defendant is granted a judgment of nonsuit.

REVERSED WITH DIRECTIONS.

McBRIDE, C. J., and JOHNS, J., concur, and BEAN, J., concurs in the result.

Argued September 18, affirmed October 8, 1918.

ANDERSON *v.* ANDERSON.

(175 Pac. 287.)

Judgment—Lis Pendens—Setting Aside Default—Effect.

1. Order under Section 59, L. O. L., setting aside default, restores the cause to the court's control, so that it becomes *lis pendens* with all its incidents.

Judgment—Vacating Orders—At Same Term.

2. At the term at which a court makes an order or determination, though it be a final judgment or decree, it may modify or vacate it.

Judgment—Vacating Orders—After Term.

3. The court, making an order vacating a default and giving time extending into the next term to answer, has jurisdiction at next term after filing of answer to vacate the order.

Judgment—Opening Default—Setting Aside Order of Opening.

4. The court, being convinced that it had been imposed on in vacating a default and allowing defendant to answer, can set aside the order as improvidently made.

Appeal and Error—Recital in Order.

5. Recital of fact in order appealed from imports absolute verity if nothing else is shown, as against unverified assignment of error and statement of counsel in brief.

Judgment—Opening Default—Accompanying Answer.

6. Application for leave to answer after default must be accompanied by proposed answer.

Appeal and Error—Affirmance—Reason.

7. Order vacating order opening default and allowing answer will be affirmed, assuming reason given in vacating order to be unsound, the record showing application to open default should have been denied because not accompanied by proposed answer.

[As to absolute right of defendant not personally served to have judgment opened and to defend, see note in **Ann. Cas. 1916B, 565.**]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

On October 21, 1916, Hannah F. Anderson obtained a default divorce decree against the defendant, Albert J. Anderson, having served the summons by publication. On January 30, 1917, after consideration of affidavits of the parties *pro* and *con*, the court took off the default of the defendant and allowed him ten days in which to answer the plaintiff's complaint. The essence of the defendant's affidavit was to the effect that he had no actual notice of the pendency of this suit. The answer was not filed with the affidavit, but was deposited with the clerk on February 3, 1917. Three days afterward the court made the following order:

"Comes now the above-named plaintiff by her attorney in open court and moves that the *order* heretofore granted by this court setting aside the default in the above-entitled cause be stricken from the records and held for naught.

"And it appearing to the court, from a letter exhibited by plaintiff written by defendant, and dated the fifth day of August, 1916, and addressed to plain-

tiff, therein acknowledging notice of the divorce proceedings pending in this court, showing thereby that he had received notice thereof nearly three months prior to the hearing and granting of the decree in said cause,

"IT IS THEREFORE ORDERED that said order heretofore granted setting aside said default in said above cause and allowing defendant to answer and file his cross-complaint in said cause, be and the same is hereby annulled, set aside and stricken from the records, and that the motion of defendant to set aside said default is denied."

The defendant appealed, assigning two grounds of error; first:

"That the court erred in the impromptu hearing held on the sixth day of February, 1917, wherein he accepted as genuine, without the introduction of testimony, a letter purporting to be written by said defendant to said plaintiff on the fifth day of August, 1916," and, second, substantially that the Circuit Court was in error in making the order at all. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. George P. Lent.*

No appearance for respondent.

BURNETT, J.—1. In opening the default the court operated under Section 59, L. O. L., to the effect that within one year after the rendition of a decree the defendant against whom publication is ordered may be allowed to defend the action on application and sufficient cause shown. The result of this was to restore the cause to the control of the court so that it became *lis pendens* with all its incidents, just as much as if it had been appealed to the Supreme Court, reversed and remanded for further hearing.

2, 3. It is well settled that any order or determination of a court, although it be a final judgment or decree, may be altered, modified or reversed by the court making it, at any time, during the term at which it is made: *Deering & Co.* v. *Quivey* (*Deering* v. *Creighton*), 26 Or. 556 (38 Pac. 710); *Ayers* v. *Lund,* 49 Or. 303 (86 Pac. 806, 124 Am. St. Rep. 1046); *Zelig* v. *Blue Point Oyster Co.,* 61 Or. 535 (113 Pac. 852, 122 Pac. 756); *First Christian Church* v. *Robb,* 69 Or. 283 (138 Pac. 856). The reason is based on the old common-law fiction that the whole term is considered as being but one period of time, all parts of which are ever present before the presiding judge, who makes of it but one transaction, with the condition that when it has lapsed, either by adjournment *sine die* or by operation of law, the whole matter has passed from the bosom of the court and beyond its control. This much is true only of final judgments or decrees fully disposing of the whole litigation. The cases of *Reynolds* v. *Barnes,* 76 Pa. St. 427, and *Horner* v. *Hower,* 39 Pa. St. 126, cited by the defendant, are both instances where the effort was to attack a final judgment in the court rendering it and that too long after the close of the term at which it was entered. Those precedents are not applicable to a situation where control of the cause has been restored to the court as in this instance. If, therefore, the authority of the court is retained so that something remains to be done, although it is carried over to some succeeding term, the court still has power to alter, modify or reverse the previous decision, especially if the order to be changed is interlocutory in its nature. In Multnomah County, whence this appeal originates, there is a term of the Circuit Court beginning on the first Monday of each month in the year except July and August. We discern from the record, therefore,

that the default was removed at the January term. The answer was filed and the order from which this appeal is taken was made at the February term. Taking off the default restored the cause to the control of the court and at the latter term it was in the same condition that it was prior to the final decree, and hence ripe for the action of the court in setting aside the interlocutory order allowing the defendant to answer. It was within the jurisdiction of the court, therefore, to vacate the order allowing the defendant to answer: *Henrichsen* v. *Smith,* 29 Or. 475 (42 Pac. 486, 44 Pac. 496).

4, 5. It becomes necessary, then, to determine whether the record before us shows that the court was wrong in making the order attacked by the appeal. If, as a matter of fact, the court was convinced that it had been imposed upon in making the order allowing the defendant to answer, and had been the victim of the defendant's deceit, it had the right to set it aside as having been improvidently made. It is recited in the order from which the appeal is taken that a letter written by the defendant was exhibited to the court from which it appeared that he had knowledge of the divorce proceedings nearly three months prior to the final decree. This being true, he fraudulently imposed upon the court when he represented by his affidavit that he had no such information. The recital in the journal of the court imports absolute verity if nothing else is shown. We have no legal data in the record enabling us to dispute the statement of the court that the letter was the genuine writing of the defendant. All we have in opposition is the unverified assignment of error and the statement of counsel in the brief to the effect that the court accepted the letter as genuine, without the introduction of testimony, and no showing

whatever is made that the document is not authentic. We cannot say, therefore, that the court exercised its function erroneously when it set aside the interlocutory order taking off the default.

6, 7. Besides all this, however, a good reason for the court's action is found by an inspection of the record, so that it was justified in holding as erroneous the order in opening the default. It is a well-established rule in this state that all applications for leave to answer after default must be accompanied by the answer proposed: *Oregon Investment & Mortgage Co.* v. *Keller,* 85 Or. 262 (166 Pac. 762). The record before us shows that the answer was not presented with the application for leave to answer, but was filed during the next term of court. The application ought to have been denied in the first place. Conceding, therefore, for the sake of the argument, that the reason given by the court based upon the letter was not sound, yet we discover in the record a good reason for the court's correcting its own error. The decree appealed from must be affirmed. Affirmed.

McBride, C. J., and Benson and Harris, JJ., concur.

Motions to dismiss appeals allowed March 5, argued on rehearing of motion to dismiss appeals July 17, appeals dismissed October 8, 1918.

In Re WATERS OF CHEWAUCAN RIVER.

(171 Pac. 402; 175 Pac. 421.)

Appeal and Error—Parties—Intervention on Appeal.

1. The Supreme Court is a court of appellate jurisdiction only, and cannot admit interveners who were strangers to the proceeding below, as that would be an exercise of original jurisdiction.

Appeal and Error—Notice of Appeal—Adverse Parties.

2. Anyone whose rights may be injuriously affected by the modification of a decree is a party adverse to the one appealing, and should be served with notice of appeal.

Appeal and Error—Notice of Appeal—Parties—Dismissal.

3. A proceeding was commenced before the board of control to determine the relative rights of the users of the water of a river, and on notice numerous users appeared and filed their claims and notices of contest, and after hearings, etc., the record was filed in the Circuit Court, and it entered a decree modifying the findings of the board, from the whole of which decree two of the parties appearing before the board and the Circuit Court separately appealed, but failed to serve notice of appeal upon all the parties appearing in the Circuit Court. Section 6650, L. O. L., as amended by Laws of 1913, page 161, provides that in such proceedings appeals from the decree may be taken to the Supreme Court the same as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the decree, and Section 556 provides that upon an appeal from a decree the suit shall be tried upon the transcript and accompanying evidence. *Held* that, as the rights of all the parties were put in issue by the appeals, the failure to give notice of appeal to all who were parties below deprived the Supreme Court of jurisdiction of the subject matter.

Appeal and Error—Appellate Jurisdiction—Notice of Appeal.

4. To give the Supreme Court jurisdiction, notice of appeal must be served upon every adverse party.

Appeal and Error—Right of Appeal—Conditions.

5. The privilege of appeal is not inherent or constitutional, but exists only by virtue of the statute, and if the statute is burdensome in respect to notices of appeal, expenses, etc., it is not the province of the court to amend it or to dispense with its requirements, especially in view of Section 550, L. O. L., as amended by Laws of 1913, page 617, granting the privilege of giving oral notice of appeal in open court at rendition of final decree.

Appeal and Error—Notice of Appeal—Contents.

6. A notice of appeal should contain enough in its terms to show that the party presenting the same is really a party to the record sought to be reversed or modified.

ON REHEARING.

Appeal and Error—Right of Appeal—Statute.

7. No appeal exists as a matter of right, but must be founded on statute.

Appeal and Error—Dismissal of Appeal—Policy of Court.

8. In view of the statute and rules of court which, where good faith is shown, provide for any amendment necessary to perfect appeal after notice of appeal and after Supreme Court has acquired jurisdiction, it is Supreme Court's policy to sustain rather than to dismiss an appeal.

Appeal and Error—Notice of Appeal—Jurisdiction of Supreme Court—Statute.

9. The appellate court has no legal discretion over the service of the notice of appeal, and to give the Supreme Court jurisdiction on the merits there must be a strict compliance with Section 550,

L. O. L., as amended by Laws of 1913, page 617, providing for the service of notice of appeal.

Appearance—"General Appearance."

10. A "general appearance" must be express or implied from defendant's taking of some step in a cause beneficial to himself or detrimental to plaintiff other than one contesting the jurisdiction only, the purpose of which must bear some substantial relation to cause.

Appeal and Error—Notice of Appeal—"Party"—Statute.

11. Where all sections of water law were complied with, and, under Section 14, a claimant filed his statement, he became an actor, and appeared and submitted his water right to Circuit Court's jurisdiction for adjudication and to obtain his water right certificate, and was a party to proceeding entitled under Section 550, L. O. L., as amended by Laws of 1913, page 617, and in view of Section 6650 as amended by Laws of 1913, page 161, to notice of appeal.

Appeal and Error—Notice of Appeal—"Adverse Party."

12. Under Section 550, L. O. L., as amended by Laws of 1913, page 617, an "adverse party" entitled to notice of appeal is every party whose interest in relation to the judgment appealed from is in conflict with a modification or reversal sought by the appeal; every party interested in sustaining the judgment.

Appeal and Error—Notice of Appeal—"Adverse Party"—Statute.

13. Every claimant who filed his statement with water board in a proceeding under water law, and whose water right was adjudicated by decree of Circuit Court, is bound by that decree, though not excepting in Circuit Court, and is an adverse party within Section 550, L. O. L., as amended by Laws of 1913, page 617, entitled to a notice of appeal.

From Lake: Bernard Daly, Judge.

In Banc. Statement by Mr. Justice Burnett.

A proceeding was commenced before the board of control, under Sections 6635 et seq., L. O. L., to determine the relative rights of the users of the water of Chewaucan River in Lake County. Responding to the notice of the board issued by virtue of Section 6636, ninety-nine users of the water filed their claims before the board. Some thirty notices of contest were also filed before that body and after the hearings and examinations provided for by the statute the record thus made up by the board was filed in the Circuit Court of Lake County. A date for hearing the same was fixed

by the court and notice thereof was given to all the claimants who had appeared in the proceeding. After hearing the parties and taking further evidence the Circuit Court modified the findings of the board and entered a decree accordingly. From this decree and the whole thereof the Northwest Townsite Company and the Portland Irrigation Company, parties appearing both before the board and the Circuit Court, have separately appealed. Neither of them served its notice of appeal upon the other appellant nor on all of the individuals who appeared before the board and the Circuit Court. In fact, there are about seventy claimants and parties to the record in the Circuit Court upon whom no such notice has been served by anyone.

Some of the parties upon whom that paper was served have moved to dismiss the appeal on the ground that it was not served upon the other parties to the record before the Circuit Court named in the motion. Another ground of dismissal specified by another motion is that the notice does not contain the names of the parties to the suit and that there is nothing in the paper itself to show that the one promulgating it was a party to the proceeding at any stage. Separate motions were made on behalf of certain individuals who were not made parties to the proceeding at any stage and applied to this court for the first time for leave to intervene and dismiss the appeal of the Portland Irrigation Company on the ground that they had entered into contract with that concern to buy land included in a certain irrigation project and were induced to do so by sundry representations that ample water rights were appurtenant to the tracts which they had contracted to buy, but that said statements were untrue and amounted to fraud upon them. These matters appeared by affidavit filed in this court and

the affiants move to dismiss the appeal on the ground that the prolongation of the litigation involved would defer their settlement with the company with which they had contracted. We also have a brief emanating from the office of the Attorney General and that of the state desert land board, as *amici curiae,* resisting the motion to dismiss the appeals, contending that the award of water to the parties to this proceeding will materially interfere with proposed irrigation projects contemplated by the state authorities.

Appeals Dismissed.

Messrs. Wood, Montague, Hunt & Cookingham, for appellants, Northwest Townsite Company and Portland Irrigation Company.

Mr. Alfred E. Reames, for W. Y. Miller et al.

Mr. W. Lair Thompson, for Fred T. Elsey et al. and Chewaucan Land & Cattle Company.

Mr. Conrad P. Olsen, for J. T. Wenstrom et al.

Mr. George M. Brown, Attorney General, and *Mr. Percy A. Cupper,* Assistant Secretary State Desert Land Board, *Amici Curiae.*

BURNETT, J.—1. The motion of the interveners, who attack the Northwest Townsite Company and the Portland Irrigation Company for the first time in this court, in an effort to remove their appeals as an obstacle to their settlement with the latter concern, is not entitled to consideration here. This court is one of appellate jurisdiction only. It cannot

admit interveners, as that would be an exercise of original jurisdiction. If the parties concerned in this motion had desired to participate in the litigation it was their duty to apply at least to the Circuit Court, if not to the water board. Acting under Section 38, L. O. L., and to preserve the matter involved in the appeal over which it has jurisdiction, this court has in some instances substituted parties when the suit or action would otherwise abate by the death or other disability of a party or by transfer of some interest therein if the cause of action survived, but that is not like the case before us, where strangers intrude upon the litigation, not seeking to be substituted for any party thereto, but making a new attack upon one of the litigants.

The statement of the principle that this court is one of appellate jurisdiction only and that to admit strangers to participate in litigation here would be the exercise of original jurisdiction is sufficient to dismiss the motion of such parties from further consideration.

2, 3. The chief question to be decided is whether the failure to serve notice of appeal upon all the parties who appeared in the Circuit Court prevents the jurisdiction of this court attaching to the subject matter. It appears to be conceded by all parties that anyone whose rights may be injuriously affected by a modification of the decree is a party adverse to the one appealing and should be served with notice.

It is said in Section 6650, L. O. L., as amended by the act of February 21, 1913, Laws of 1913, Chapter 97, treating of this sort of procedure that:

"Appeals may be taken to the Supreme Court upon such decrees in the same manner and with the same effect as in other cases in equity, except that notice of

appeal must be served and filed within sixty days from the entry of the decree."

It is also said in Section 556, L. O. L., that:

"Upon an appeal from a decree given in any court the suit shall be tried anew upon the transcript and evidence accompanying it."

We note, also, that the appeal in each instance here is from the decree and the whole thereof, so that the entire determination of the Circuit Court is called in question. In other words, the adjustment of the relative rights of all the parties concerned before the trial court respecting the waters of the Chewaucan River is put at stake by the appeals. This necessarily involves the examination of the entire question and all the issues of the proceeding. The whole affair is subjected to readjustment, if we have jurisdiction of the same. The two parties appealing are dissatisfied with the settlement in the Circuit Court. They want more water or more favorable terms for the use of what they have. If successful, this means that the award to other parties will be disturbed in some measure. The enterprise of the Portland Irrigation Company, for instance, must be within irrigation limits of the stream. We will suppose that this appellant is successful in securing a modification of the decree, so that it will acquire more water. If such is the result it will *pro tanto* lessen the amount which will flow down the stream and be open to future appropriation, not only to those parties who are served with notice, but also by those who are not served and who already have or may hereafter obtain access to the stream. The fact that appropriations for certain tracts of land, as related to all others involved, have been established by the decree does not deprive their owners of the right

to make additional appropriations in the future, if water is there to be appropriated and can be applied to beneficial uses. This is true of both those below and those above any existing appropriator. Those below him are entitled to the water in excess of his appropriation; those above him are entitled, of course, to their original rights and also to appropriate water otherwise unappropriated, and not necessary to fill his quota.

If the presence of these parties was necessary for the exercise of the jurisdiction of the Circuit Court, it is none the less essential to the exercise of the limited appellate authority of this court. The reason is that the very essence of any decree in such litigation is the determination of the relative rights of the parties. This element of each right being relative to all others persists from the beginning to the end of such litigation, so that the plaint of one party must affect all others in a greater or less degree.

The uses to which water may be put are manifold and variable and fluctuate as much as the rise and fall of the stream itself, so that it is important at every stage of the proceeding for the court to have before it all whose rights attach to the thing submitted to the court for adjustment. This quality of variability was so apparent to the legislative power that it has provided in Section 6654, L. O. L., as follows:

"Within six months from the date of the decree of the Circuit Court determining the rights upon any stream, or if appealed within six months from the decision of the Supreme Court, the board of control, or any party interested, may apply to the Circuit Court for a rehearing upon grounds to be stated in the application. Thereupon, if in the discretion of the court it shall appear that there are good grounds for the rehearing, the Circuit Court, or judge thereof, shall

make an order fixing a time and place when such application shall be heard."

4, 5. This, however, does not alter the rule long established in respect to proceedings in this court, that in order to give it jurisdiction to act, the notice of appeal must be served upon every adverse party. It is contended that this involves such a great expense, owing to the large number of parties, that it practically destroys the right to appeal. This privilege, however, is not inherent nor constitutional. It exists only by virtue of the statute and if the application of the enactment is burdensome it is not the province of the courts to amend the same or to dispense with its requirements. The remedy must be found in the legislative branch of the government. Moreover, the Code, in Section 550, L. O. L., as amended by Chapter 319, Laws of 1913, grants the privilege of giving oral notice of appeal in open court at the rendition of final decree which certainly cannot be extraordinarily expensive.

6. Respecting the contents of the notice of appeal, it would seem that such a document should contain enough in its terms to show that the party presenting the same is really a party to the record sought to be reversed or modified. Otherwise, any stranger could intrude upon a proceeding without having any interest whatever in the same. It would more widely open the door to those who come before the court under the designation of *amici curiae,* when in reality they are bitter partisans or "Greeks bearing gifts." So far as the terms of the notices before us are concerned, they might have been given by the veriest strangers. It is sufficient for the purposes of this decision, however, to rest it upon the principle that the court has not ac-

quired jurisdiction because many of the adverse parties have not been served with notice of appeal.

The appeals must be dismissed.

APPEALS DISMISSED.

MR. JUSTICE BEAN concurs in the result.

MR. JUSTICE MCCAMANT and MR. JUSTICE BENSON took no part in the consideration of this case.

Appeals dismissed October 8, 1918.

ON REHEARING.

(175 Pac. 421.)

From Lake: BERNARD DALY, Judge.

In Banc.

This proceeding is founded upon what is known as the water law of 1909, entitled, "An act providing a system for the regulation, control, distribution, use, and right to the use of water, and for the determination of existing rights thereto within the State of Oregon, providing penalties for its violation and appropriating money for the maintenance thereof." That law creates two water divisions, provides for one superintendent for each division and defines his duties. The act also provides for the appointment of a state engineer who, with the superintendents, shall constitute a board of control (now called the state water board), hereinafter referred to as the board, which shall have supervision of the waters of the state, and of the appropriation, distribution and diversion thereof.

"The decisions of said board shall be subject to appeal to the Circuit and Supreme Courts, which appeal

shall be governed by the practice in suits of equity, unless otherwise specified herein."

Section 11 provides that upon a petition to the board filed by one or more water users of any stream, requesting the determination of the rights of the claimants to the waters thereof, it shall be the duty of the board, if it finds the facts justify, to make a determination of said rights, fixing the time for the taking of testimony and the making of such an examination as will enable it to determine the rights of the various claimants.

"Section 12. *Notice of Proceedings:* The board shall prepare a notice, setting forth the date when the engineer will begin an investigation of the flow of the stream and of the ditches diverting water therefrom, and a place and a time certain when the superintendent of the water division in which that stream is situated shall begin the taking of testimony as to the rights of the parties claiming water therefrom. Said notice shall be published in two issues of one or more newspapers having general circulation in the counties in which such stream is situated, the last publication of said notice to be at least thirty days prior to the beginning of taking testimony by said division superintendent, or for the measurement of the stream by the state engineer, or his assistant. The superintendent taking such testimony shall have the power to adjourn the taking of testimony from time to time and from place to place, to suit the convenience of those interested."

"Section 13. *Notice to Claimants:* It shall be the duty of said division superintendent to send by registered mail to each person, firm or corporation, hereinafter to be designated as claimant, claiming the right to the use of any of the waters of said stream, and to each person, firm or corporation owning or being in possession of lands bordering on and having access to said stream or its tributaries, in so far as such claimants and owners and persons in possession can reasonably be ascertained, a similar notice setting forth the

date when the state engineer or his assistant will begin the examination of the stream and the ditches diverting the waters therefrom, and also the date when the superintendent will take testimony as to the rights to the water of said stream. Said notice must be mailed at least thirty (30) days prior to the date set therein for making the examination of the stream or the taking of such testimony."

"Section 14. *Statement of Claimant:* The division superintendent shall, in addition, inclose with said notice a blank form on which said claimant or owner shall present in writing all the particulars necessary for the determination of his right to the waters of the stream to which he lays claim, the said statement to include the following:

"The name and postoffice address of the claimant.

"The nature of the right or use on which the claim is based.

"The time of initiation of such right or the commencement of such use, and if distributing works are required.

"The date of beginning of construction.

"The date when completed.

"The date of beginning and completion of enlargements.

"The dimensions of the ditch as originally constructed and as enlarged.

"The date when water was first used for irrigation or other beneficial purposes, and if used for irrigation, the amount of land reclaimed the first year, the amount in subsequent years, with the dates of reclamation, and the amount and general location of the land such ditch is intended to irrigate.

"The character of the soil and the kind of crops cultivated, and such other facts as will show a compliance with the law in acquiring the right."

Under Section 15 the claimant is required to verify his "statement," for which blanks shall be furnished, and the superintendent is authorized to administer the oath. Under Section 16, upon the date specified in the

notice, the division superintendent shall begin the taking of such testimony and shall continue until completed. Section 17 provides that the claimants shall pay certain fees, and for an additional fee of so much per acre for each acre of irrigated land.

"Section 18. *Notice upon Completion of Testimony:* Upon the completion of the taking of testimony by the division superintendent, it shall be his duty at once to give notice by registered mail to the various claimants that at a time and place named in the notice not less than ten days thereafter, all of said evidence shall be open to inspection of the various claimants or owners, and said superintendent shall keep said evidence open to inspection at said places not less than ten days, and such other time as fixed in the notice. Said superintendent shall also state in said notice the county in which the determination of the board of control will be heard by the Circuit Court; *provided,* that said cause shall be heard in the county in which said stream or some part thereof is situate."

"Section 19. *Contests:* Should any person, corporation or persons owning any irrigation works, or claiming any interest in the stream or streams involved in the determination, desire to contest any of the rights of the persons, corporations or associations who have submitted their evidence to the superintendent as aforesaid, such persons, corporations or associations, shall within five days after the expiration of the period as fixed in the notice for public inspection, notify the superintendent in writing, stating with reasonable certainty the grounds of their proposed contest, which statement shall be verified by the affidavit of the contestant, his agent or attorney, and the said division superintendent shall notify the said contestant and the person, corporation or association, whose rights are contested, to appear before him at such convenient place as the superintendent shall designate in said notice."

Sections 20 and 21 provide for the filing of contests before the board, notices thereof and hearings thereon.

"Section 22. *Evidence Transmitted:* Upon the expiration of the period for which the evidence is kept open for inspection, the evidence in the original hearing before the superintendent, and the evidence taken in all contests, shall be transmitted by the superintendent to the office of the board of control in person, or by registered mail. Such evidence shall thereupon be filed with the board."

Section 23 makes it the duty of the state engineer or his assistants, at the time specified in the notice therefor, to make an examination of the stream and the works diverting water therefrom, which shall include the measurement of the discharge of said stream, of the carrying capacity of the various ditches and canals, an examination of the irrigated lands, and "to take such other steps and gather such other information and data as may be essential to a proper understanding of the relative rights of the parties interested," all of which shall be reduced to writing; and to make a map or plat showing the location of each ditch or canal and the legal subdivisions of the lands irrigated or which are susceptible of irrigation.

"Section 24. *Order Determining Water Rights:* As soon as practicable after the compilation of said data, and the filing of said evidence, it shall be the duty of the board of control to make, and cause to be entered of record in its office, an order determining and establishing the several rights to the waters of said stream. As soon as practicable thereafter a certified copy of said determination shall be filed in the office of the county clerk of each county in which said stream, or any part thereof or any tributary, is situated, and the original evidence filed with the board of control shall be certified by the clerk of the board and, together with a certified copy of said determination, shall be filed with the clerk of the Circuit Court by which court such determination is to be heard. The determination of the board shall be in full force and effect from the

date of its entry in the records of the board, unless and until its operation shall be stayed by a stay bond as provided for by this act. Upon the filing of the evidence with the Circuit Court of the county in which the determination is to be had, the board shall procure an order from said Circuit Court, or any judge thereof, fixing the time at which the determination shall be heard in said court. Copies of this order, certified by the clerk of said court, shall be filed by the board as soon as practicable in the office of the county clerk of each county in which said determination is filed."

"Section 25. *Water Right Certificate:* Upon the final determination of the rights to the waters of any stream, it shall be the duty of the secretary of the board of control to issue to each person, association or corporation represented in such determination, a certificate to be signed by the president of the board of control, and attested under seal by the secretary of said board, setting forth the name and postoffice address of the owner of the right; the priority of the date, extent and purpose of such right; and if such water be for irrigation purposes, a description of the legal subdivisions of land to which said water is appurtenant. Such certificate shall be transmitted by the president, or other member of the board of control, in person or by registered mail, to the county clerk of the county in which such right is located, and it shall be the duty of the county clerk upon receipt of the recording fee of one dollar collected as hereinbefore provided, to record the same in a book especially prepared and kept for that purpose, and thereupon immediately transmit the certificates to the respective owners."

"Section 26. *Court Procedure:* From and after the filing of the evidence and order of determination in the Circuit Court, the proceedings shall be as nearly as may be like those in a suit in equity, except that any proceedings, including the entry of a decree, may be had in vacation with the same force and effect as in term time. Within thirty days from the filing of such evidence and order in the Circuit Court, or within such further time as the court may for good cause allow,

any party may file exceptions to the determination. If no exceptions shall be filed, the court shall on the day set for hearing enter a decree affirming the determination of the board.

"All parties may be heard by counsel upon the consideration of the exceptions. The court may, if necessary, remand the case for such further evidence to be taken by the superintendent of the water division as it may direct, and may require a further determination by the board. After the hearing, the court shall enter a decree affirming or modifying the order of the board of control. Upon the hearing, the court may assess and adjudge against any party such costs as it may deem just. Appeals may be taken to the Supreme Court from such decrees in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within sixty days from the entry of the decree."

"Section 27. *Clerk Shall Transmit Transcript to Clerk of Board:* The clerk of the Circuit Court, immediately upon the entry of any decree by the Circuit Court or by the judge thereof, shall transmit a certified copy of said decree to the secretary of the board of control. The secretary shall immediately enter the same upon the records of such office and the state engineer shall forthwith issue to the superintendent or superintendents of water divisions instructions in compliance with the said decree, and in execution thereof."

"Section 28. *Distribution:* During the time the hearing of the order of the board of control is pending in the Circuit Court, and until a certified copy of the judgment, order or decree of the Circuit Court is transmitted to the board of control, the division of water from the stream involved in such appeal shall be made in accordance with the order of the board."

Section 29 provides that after the determination of the board the operation thereof may be stayed by the order of any judge of the Circuit Court upon the filing of an approved bond.

Section 30 provides that within six months from the date of the decree of the Circuit Court, or if appealed, within six months from the decision of the Supreme Court, any interested party may apply to the Circuit Court for a rehearing upon grounds to be specified in the application.

"Section 33. *Conclusive, When:* The determination of the board of control as confirmed or modified as provided by this act in proceedings shall be conclusive as to all prior rights, and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination."

"Section 34. *Duty of Water Right Claimants:* Whenever proceedings shall be instituted for the determination of the rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law; and any such claimant who shall fail to appear in such proceedings and submit proof of his claims shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceedings, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him. * * "

Based upon a petition as provided for in Section 11, the board undertook to adjudicate the water rights of Chewaucan River in Lake County. The record shows a literal compliance with both the spirit and intent of the water law and that pursuant to notice, under Section 14, eighty-nine claimants made and filed one hundred and sixty proofs of claim of their respective water rights in and to the waters of the stream. After the filing of the "statements," the taking of a large amount of testimony and the hearing of a number of contests, the board made its order "determining and establishing the several rights to the waters of the said stream," as provided by Section 24, and thereafter filed certified

copies of the evidence taken and of its findings with the clerk of the Circuit Court for Lake County, and procured an order from that court fixing May 15, 1916, as the date for the hearing on the determination in said court. Notices of the time and place of such hearing were duly given and under Section 26, twenty-five different claimants made and filed in the Circuit Court nineteen different exceptions to the findings of the board. On application the court made an order extending the time for the hearing on such exceptions until August 28, 1916, when the parties who made such exceptions appeared in court by their respective attorneys. The court also made an order for the taking of additional testimony and by consent of all parties who filed such exceptions the court, with their attorneys, made an inspection of the waters of said stream and its various tributaries, ditches and canals. After the taking of such additional testimony as was then offered the court, on December 2, 1916, made and filed findings of fact in and by which it materially modified many of the findings of the board, and made and rendered a decree upon the findings as modified, adjudicating the water rights of the stream among the different claimants and defining their respective interests.

The board allowed one cubic foot of water per second to each 40 acres of land; the Circuit Court allowed one cubic foot to each 25 acres. The board did not make any findings as to the volume of water which should be used upon an acre of land during the irrigating season, but the court found that the claimants were entitled to amounts ranging from 3.9 to 4.8 acre-feet to be used on each acre of land during each irrigation season. As to the irrigating period there is a material difference between the findings of the board and those of the Circuit Court.

In its "statement" filed with the board the Portland Irrigation Company, one of the appellants, claims that it is the owner of 12,037 acres of land and the right to the use of 15,000 inches of water under six-inch pressure; that such right was initiated September 30, 1905, and that 375 cubic feet of water per second continuous flow and 42,800 acre-feet storage are necessary for the proper irrigation of its lands. The board found that it had never used any water whatever for irrigation purposes, but that it did have an inchoate right, conditional upon the application of such waters to a future beneficial use. The court found that it did not have any water right whatever.

The Northwest Townsite Company, the other appellant, under Proof 129, as of the year 1881, claimed ½ cubic foot of water per second; under Proof 130, as of 1885, 2 cubic feet per second; under Proof 131, as of 1886, ½ cubic foot per second for irrigation purposes and 30 cubic feet per second all of the time for power purposes; under Proof 132, as of June 11, 1897, 11.75 cubic feet per second for irrigation purposes. The board allowed .43 cubic foot under Proof 129, 2 cubic feet under Proof 130, .17 cubic foot under Proof 131 and 30 cubic feet all of the time for power purposes, and under Proof 132, 4 cubic feet. The court found that at no time prior to 1913 were more than 160 acres of land irrigated through the Conn ditch; that any additional land irrigated through that ditch since 1913 was by permit issued by the state engineer in 1912 for the enlargement thereof, and that the water used for power purposes should be returned to the stream "without substantial diminution in quantity," and also made other material changes in the findings of the board.

After the decree was rendered in the Circuit Court and within the sixty days, the Northwest Townsite Company and the Portland Irrigation Company undertook to appeal, and maintained that they served the notice of appeal upon any and all of the claimants who filed exceptions in the Circuit Court. But it is conceded and the record shows that the notice of appeal was not served upon any claimants who did not file exceptions in the Circuit Court. Based upon affidavits, motions to dismiss the appeal were duly filed by a number of the claimants for the reason that any and all of the persons who made and filed with the board "statements" or proofs of claim of their water rights had appeared in and were bound by the decree of the Circuit Court and were adverse parties to the appellants and that each of such claimants should have been served with the notice of appeal. The motions were submitted to this court on typewritten briefs and were sustained in an opinion by Mr. Justice BURNETT, *ante*, p. 659 (171 Pac. 402), and the appeals were dismissed. Appellants' counsel then filed a very able and vigorous petition for a rehearing, which was granted. Printed briefs were then filed by opposing counsel and an oral argument was made before this court sitting *in banc*.

The question is squarely presented as to whether claimants who filed their "statement" or proof of claim with the board and who did not file exceptions in the Circuit Court are adverse parties to the appellants and whether the facts shown by the record constitute such an appearance by such claimants in the Circuit Court as to entitle them to be served with a notice of appeal. APPEALS DISMISSED.

Mr. W. Lair Thompson, Mr. Evan Reames and *Mr. Walter Rothchilds,* for the motion.

Mr. C. E. S. Wood and *Mr. Lionel R. Webster, contra.*

JOHNS, J.—7–9. No appeal exists as a matter of right. It must be founded upon a statute. After the notice of appeal has been served and this court has acquired jurisdiction, both the statute and the rules of this court, where good faith is shown, provide for any amendment or correction which may be necessary to perfect the appeal. On such a showing and under such provisions it has always been the policy of this court to sustain rather than to dismiss an appeal, but it is by and through service of the notice of appeal, and service only, that this court acquires jurisdiction, and the statute specifically points out and defines how a notice of appeal should be served, when served and upon whom it should be served, and all the authorities hold that the appellate court does not have any legal discretion over the service of the notice of appeal, and that to give this court jurisdiction to hear and determine a case on the merits there must be a strict compliance with any and all of the terms and provisions of the statute.

Among other things, Section 550, L. O. L., as amended, provides:

"The party desiring to appeal may cause a notice, signed by himself or attorney, to be served on such adverse party or parties as have appeared in the action or suit, or upon his or their attorney, at any place in the state, and file the original, with proof of service indorsed thereon, with the clerk of the court in which the judgment, decree or order is entered,"

and Section 6650, L. O. L., as amended by the Laws of 1913, provides that:

"Appeals may be taken to the Supreme Court from such decrees in the same manner and with the same

effect as in other cases in equity, except that notice of appeal must be served and filed within sixty days from the entry of the decree."

10. Hence the question is presented: First, who did appear in the Circuit Court? And, second, who are adverse parties?

"A general appearance must be express or arise by implication from the defendant's seeking, taking or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to the plaintiff other than one contesting the jurisdiction only. The purpose of this appearance, however, must bear some substantial relation to the cause. In other words, it must be a purpose within the cause, not merely collateral thereto. As to what constitutes a general appearance conferring jurisdiction over the person, the test according to a late decision of the Federal Supreme Court is whether the defendant became an actor in the cause": 2 R. C. L., p. 327, § 7.

In the case of *Merchants' Heat & Light Co.* v. *J. B. Clow & Sons,* 204 U. S. 283, 290 (51 L. Ed. 488, 27 Sup. Ct. Rep. 285), it is said:

"There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits."

11. When an individual having a water right receives the notice specified in Section 12 of the water law of 1909 and does not make and file his "statement" as provided in Section 14, he knows as a matter of law that he is in default and that he will lose his water right, as provided in Section 34. But when one having a water right receives the notice specified in Section 12, makes and files his statement of claim as provided in Section 14 and pays the fees required, he knows as a matter of law that the board will investigate his water

right and that under Section 24, as soon as practicable after such investigation, it will make an order determining his water right and file a certified copy of its findings in the office of the county clerk of the county in which his water right is located, and that in and by subsequent proceedings, as provided for in Section 26, the Circuit Court of that county will make an order approving or modifying such findings, and based thereon will render a decree finally adjudicating his water right; that under Section 25 he will then receive his water right certificate under the seal of the board, which shall set forth his name and postoffice address, the priority of the date, the extent and purpose of his water right, and a description of the land to which it is appurtenant, and that such certificate is entitled to public record. And he knows that Section 33 provides that:

"The determinations of the board of control as confirmed or modified as provided by this act in proceedings shall be conclusive as to all prior rights, and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination."

His water right is then adjudicated by a solemn decree of the Circuit Court and the evidence of that right which formerly existed in parol then becomes and is perpetuated by a public record. It was for the purpose of having his water right adjudicated and perpetuated in a public record and to obtain such a certificate and public record that he filed his "statement" or proof of claim under Section 14 and paid the fees which the statute requires.

In *Pacific Livestock Co.* v. *Cochran,* 73 Or. 417, 428 (144 Pac. 668), this court, speaking through Mr. Chief Justice McBride, said:

"It is evident that a failure by the claimant of a water right to appear and submit his claims when properly required to do so bars his right to assert it thereafter to the same extent that a party is barred who makes default after service of summons in a proceeding at law. * * A determination of the water rights to a stream finally ends as a report to the Circuit Court, and a decree of final determination by that court."

If a party who fails to make and file his "statement" as provided for in Section 14 is barred and loses his right, it must follow that anyone who does make and file his proof of claim as required by that section is not barred and does not lose his right, and that in the making and filing of such "statement" and the payment of the required fees and in the subsequent proceedings of the board and the Circuit Court, he then and thereby submits himself and the adjudication of his water right to the jurisdiction of the Circuit Court. How can any claimant who failed to appear and file his proof of claim be barred of his water right unless it is a judicial proceeding? How can the determination of the board as confirmed or modified by the Circuit Court be conclusive as to all prior rights and the rights of all existing claimants upon the stream, unless the board and the Circuit Court have jurisdiction of the claimants and their respective rights?

Under Section 14 the claimant makes and files a written statement of all of the particulars necessary for the determination of his water right: First, of his name and postoffice address; second, the nature of the right and use on which his claim is based; third, the initiation of his right; fourth, the date when he commenced construction; fifth, the date when completed; sixth, the commencement or completion of any enlargement; seventh, the dimensions of the ditch as originally constructed and enlarged; eighth, the date when he first

used water for irrigation or other beneficial purposes, and the amount of land irrigated for the first and subsequent years and the location of his land; ninth, the character of the soil, the kind of crops, and any other facts showing how he acquired his water right. This constitutes his formal complaint, upon which the board makes its investigation and findings, which are modified or approved by the Circuit Court and upon which its decree is rendered. Up to and including the findings of the board, our water law is almost a literal copy of that of the State of Wyoming. But thereafter there is this difference between the two: the Wyoming statute provides for an appeal from the findings of the water board to the District Court and our statute provides for the filing of the findings of the board in the office of the clerk of the Circuit Court, and based on subsequent proceedings, after notice thereof, the Circuit Court shall then approve or modify the findings and render a decree thereon. In an exhaustive opinion in the case of *Farm Investment Co.* v. *Carpenter,* 9 Wyo. 110, 147 (61 Pac. 258, 87 Am. St. Rep. 918, 50 L. R. A. 747), the Supreme Court of that state held:

"It may be assumed that, in the absence of fraud or collusion, any matter actually and legally determined by the final decree of the board becomes *res judicata,* at least as to the public, and the parties participating in the proceedings."

If the findings of the board, from which the right of appeal exists, are *res judicata* under the Wyoming statute, *a fortiori* they should be *res judicata* under our statute, which requires them to be filed in, and approved by, the Circuit Court.

Our water law has been construed, its validity and constitutionality assailed, and was upheld in *Wattles* v. *Baker County,* 59 Or. 255 (117 Pac. 417); *Pringle Falls Power Co.* v. *Patterson,* 65 Or. 474, 484 (128 Pac.

820, 132 Pac. 527); *Claypool* v. *O'Neill,* 65 Or. 511 (133 Pac. 349); *Pacific Livestock Co.* v. *Cochran,* 73 Or. 417 (144 Pac. 668); *In re Willow Creek,* 74 Or. 592 (144 Pac. 505, 146 Pac. 475); *In re North Powder River,* 75 Or. 83 (144 Pac. 485, 146 Pac. 475), and in the case of *Pacific Livestock Co.* v. *Oregon Water Board,* 241 U. S. 440 (60 L. Ed. 1084, 36 Sup. Ct. Rep. 637), in which the opinion was written by Mr. Justice VAN DEVANTER. That jurist, prior to his appointment to the Supreme Court of the United States was a resident and Chief Justice of Wyoming, after that state enacted its water law. On pages 448, 451 and 453 of 241 U. S., the opinion says:

"It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end: First, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; Second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties. * * All the evidence laid before it goes before the court, where it is to be accorded its proper weight and value. That the state, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the court is not debatable. * * The statute discloses a fixed purpose to secure timely notice to all claimants of each material step in the proceeding and full opportunity to be heard in respect of all that bears upon the validity, extent and priority of their claims."

In the case of *In re Willow Creek,* 74 Or. 592 (144 Pac. 505), on page 611 of the report (page 512 of 144 Pac.), this court says:

"The findings of the board are advisory rather than authoritative. It is only when the courts of the state

have obtained jurisdiction of the subject matter and of the persons interested, and rendered a decree in the matter determining such rights that, strictly speaking, an adjudication or final determination is made,"

and in *Pacific Livestock Co.* v. *Cochran,* 73 Or. 417 (144 Pac. 668), on page 429 of the report (page 672 of 144 Pac.) it is said:

"A determination of the water rights to a stream finally ends as a report to the Circuit Court and a decree of final determination by that court."

We hold that when all other sections of the law have been complied with and under Section 14 the claimant has made and filed his "statement" or proof of claim, he then becomes an actor and submits himself and his water right to the jurisdiction of the court, and thereby appears in court for the purpose of having his water right adjudicated and to obtain his water right certificate, and that any such a claimant has appeared in and is a party to the proceeding within the meaning of Section 550 of the Code.

12. Second, who are adverse parties? In *Thompson* v. *Ellsworth,* 1 Barb. Ch. (N. Y.) 627, the court said:

"The adverse party * * means the party whose interest in relation to the subject of the appeal is in conflict with the reversal of the order or decree appealed from, or the modification sought for by the appeal."

That decision is approved and followed by Mr. Justice Sanderson in the case of *Senter* v. *De Bernal,* 38 Cal. 641, where it is said:

"Our Code allows any and every party who is aggrieved to appeal without joining anyone else, no matter what may be the character of the judgment against him, whether joint or several; and, in this respect, works a change from the former practice, but he is required to notify all other parties who are interested in opposing the relief which he seeks by his appeal,

if they have formally appeared in the action in the court below, or his appeal, as to those not served, will prove ineffectual, and also as to those served, if the relief sought is of such a character that it cannot be granted as to the latter without being granted as to the former also."

And that case is approved by this court in *The Victorian,* 24 Or. 121, 128 (32 Pac. 1040, 41 Am. St. Rep. 838). In *Moody* v. *Miller,* 24 Or. 179 (33 Pac. 402), this court said:

"The statute has not abrogated the common-law rule requiring all persons whose interests would be affected by the reversal or modification of the decree to be made parties to the appeal, and to be brought into court."

This was approved in *Osborn* v. *Logus,* 28 Or. 302 (37 Pac. 456, 38 Pac. 190, 42 Pac. 997):

"An 'adverse party' entitled to notice of appeal is every party whose interest in relation to the judgment and decree appealed from is in conflict with the modification or reversal sought by the appeal; every party interested in sustaining the judgment or decree": 1 Words & Phrases, 224, and authorities there cited.

On legal principle the case of *Hamilton* v. *Blair,* 23 Or. 64–66 (31 Pac. 197), is very similar to the instant case. This court there said:

"As in suits in equity, the case must be tried anew in the appellate tribunal, any change or any modification or any reversal of the decree by this court would necessarily have the effect to disturb or to destroy the ratable proportion established by it to be distributed among the depositors and render a new division necessary. It would follow that all the depositors who were parties to the suit in the trial court would have a substantial interest to be affected by such decree of the appellate tribunal as to render their presence necessary."

In the case of *In re Silvies River,* 199 Fed. 495, 503, Mr. Justice Bean says:

"The water is the *res* or subject matter of the controversy. It is to be divided among the several claimants according to their respective rights. Each claimant is therefore directly and vitally interested, not only in establishing the validity and extent of his own claim, but in having determined all of the other claims. The proceeding is essentially a suit for the partition of the waters of the stream among the respective owners. * * It is a case where divers and sundry parties are entitled to use so much of the waters of a stream as they have put to beneficial use and the purpose is to ascertain their respective rights by a simple, economical, effective, and comprehensive proceeding, and is not a separable controversy between different claimants."

In this proceeding the waters of the Chewaucan River are the subject matter, and the persons who filed their "statements" as provided by Section 14 are the claimants of such waters and the parties in interest. The record shows a compliance with any and all of the provisions of the water law of 1909, and that law says that the decree of the Circuit Court is conclusive as to any and all such rights adjudicated between the claimants upon the stream.

The board found that each claimant was entitled to one cubic foot of water per second to each 40 acres of land; the Circuit Court modified that finding and allowed the claimants one cubic foot of water to each 25 acres. The amount of water per acre to be used by each claimant is very vital and important. In its "statement," the Portland Irrigation Company claimed the right to the use of 375 cubic feet of water per second to irrigate 12,037 acres of land, averring that such right was initiated September 30, 1905. The Northwest Townsite Company in its "statement" claimed, together with 30 cubic feet of water per sec-

ond all of the time for power purposes, the right to sufficient water to irrigate 633 acres of land, giving the date of June 11, 1897, as the time when its last water right was initiated. It appears from the findings of the board and the decree of the Circuit Court that there were at least eight different claimants who did not file exceptions in the Circuit Court, but did file their "statements" with the board, claiming water rights initiated after September 30, 1905, which is the date of priority claimed by the Portland Irrigation Company, and their respective claims were sustained by the board, approved by the Circuit Court and made a part of the decree. It also appears from the findings of the board and the decree that there were at least twenty-three different claimants who did not file exceptions in the Circuit Court but who filed their "statements" claiming water rights initiated after June 11, 1897, the latest date on which the Northwest Townsite Company claimed a water right, and that the proofs of all such claimants were allowed, approved and became a part of the decree. Hence it must follow that as to such claimants there is a conflict as to priorities between them and the appellants.

The duty and volume of water per acre to be used are also in dispute. The board allowed one cubic foot of water per second for each 40 acres of land, and the decree awarded one cubic foot of water per second for each 25 acres. That finding is of vital importance to every claimant. There is a material difference between the findings of the board and the decree of the court as to the period of the irrigating season, which varies with the character and location of the claim. The point of diversion is also important.

If the notice of appeal were legally served and this court had jurisdiction, the case would then be tried

de novo upon its merits, and it would be not only the province of this court, but its duty also, to settle and determine from the record the priorities as between any and all claimants, the use of water per cubic foot, the volume per acre, the point of diversion, and how and when it should be used, all of which matters are very vital and material to every claimant, and as to every one of which there is a conflict between the findings of the board and the decree of the Circuit Court, and over which there would be strife and a contest in this court. The whole purpose and intent of the water law was to provide a plain and effective method by which any and all persons having or claiming a right to the use of the waters of a particular stream were to be brought into and before the Circuit Court and after investigation of the respective rights of each and every claimant the court should then and there render a decree which would forever settle and define not only the rights of each claimant, but settle and define the water rights of all claimants as between each other, and that was the legal force and effect of the decree of the lower court from which the appeal is taken. The purpose of the appeal is to have this court make other and different findings as to the priorities of all rights as between the claimants, the duty of water, the volume per acre, the point of diversion and place of use, and the period of the irrigating season, and to render a decree which will be more favorable to the appellants as to their respective water rights.

It appears from the record that 89 claimants filed 160 "statements" under Section 14; that only two of such claimants have sought to appeal from the decree; that the Portland Irrigation Company, one of the appellants, claims the right to the use of 375 cubic feet of water, contending that such right was initiated Sep-

tember 30, 1905, and yet it appears from both the findings of the board and those of the Circuit Court that at the time they were made, in 1912, the Portland Irrigation Company had never used any water at any time or for any purpose whatever. It also appears from the findings and the decree of the Circuit Court that the Northwest Townsite Company was allowed one cubic foot of water per second for each 25 acres of its land which had actually been irrigated, and that the allowance was made on the same basis for all other claimants.

13. We are of the opinion that every claimant who filed his "statement" with the board and whose water right was adjudicated by the decree of the Circuit Court is bound by that decree and is an adverse party within the meaning of Section 550, L. O. L. Under the provisions of that section, a notice of appeal may be given in open court, and it was enacted to provide a simple and effective method of serving such notice and to apply to this particular kind of a case. If, as appellants' counsel claim, they were not advised by the court as to when the decree was rendered, and therefore were denied the right to appeal by giving notice in open court, the remedy is with the legislature.

The appeals are dismissed. DISMISSED.

The late Mr. Justice MOORE took no part in the hearing or consideration of this case.

Argued July 11, affirmed October 8, 1918.

PEERLESS PACIFIC CO. *v.* MANNING.

(175 Pac. 429.)

Mechanics' Liens—Contractor—Evidence.

1. In a suit by a company to foreclose a lien for plumbing fixtures, etc., evidence *held* to show that the company, and not a party defendant who had done the plumbing work, etc., was the contractor.

Mechanics' Liens—Material—Agency—Payment.

2. A company contracting to furnish material might, if it wished, make the one performing the labor thereon its agent to receive payment, and could not complain that the owner made payments to such agent in reliance upon an express instruction from it.

Mechanics' Liens—Contractor—Evidence—Pleading.

3. In suit to foreclose lien for materials sold to a codefendant, designated as contractor and owner's agent, on his request, the owner's evidence that plaintiff, and not his codefendant, was the contractor, was admissible under an answer denying that codefendant was a contractor or agent, or that material was furnished at his request.

[As to liens of materialmen, see note in 79 Am. Dec. 268.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2.

This is a suit to foreclose a lien for materials which were used in a dwelling-house built for J. P. Tamiesie, the owner. The Peerless Pacific Company, a corporation, is a wholesaler dealing in heating plants and plumbing supplies and it furnished the heating plant and plumbing fixtures which were installed in the Tamiesie residence. The plaintiff filed a lien within the time required by law and subsequently began this suit to foreclose it.

The complaint avers that at the request of Guy C. Manning the contractor, and hence the agent of Tamiesie, the plaintiff sold to Manning materials, reasonably worth $1,659.97, which were installed in the

Tamiesie residence; that $1,514.91 has been paid; and that a balance of $145.06 is due and unpaid.

The answer of Tamiesie denies that Manning was his contractor or agent or that any of the materials were furnished at the request of Manning; and this pleading affirmatively alleges that the plaintiff was paid in full for all materials used in the house. A trial resulted in a decree for Tamiesie and the plaintiff appealed. AFFIRMED.

For appellant there was a brief over the name of *Messrs. Lewis & Finnigan,* with an oral argument by *Mr. A. T. Lewis.*

For respondents there was a brief and an oral argument by *Mr. William A. Williams.*

HARRIS, J.—1. At the oral argument counsel for plaintiff stated that only two questions were presented by the appeal: (1) whether Manning was the contractor; and (2) whether the answer filed by Tamiesie was sufficient to admit the evidence relied upon by him. The record will therefore be examined for the purpose of deciding those two questions. The plaintiff claims that Manning was the contractor for both the materials and the labor while the defendant Tamiesie contends that the plaintiff was the real contractor for the materials. It is conceded that R. H. Griffith, a salesman for the plaintiff, solicited Tamiesie to purchase the materials for the house. Manning was not known to Tamiesie until after Griffith had quoted prices to Tamiesie for most of the materials needed for the building. After Manning was introduced to Tamiesie the former made an additional list of needed materials, and Griffith quoted prices on the additional list. Afterward, on February 9, 1915, a written con-

tract was entered into fixing $1,014 as the price to be paid for the labor and materials for the installation of the plumbing, and $950 as the sum to be paid for the labor and materials used in the installation of a heating plant. Manning claims that before signing the writing it was understood with the plaintiff that the latter would furnish the plumbing supplies for $864 and the heating plant for $676 or a total of $1,540, leaving $150 to Manning for his labor on the plumbing and $274 for his labor on the heating plant, or a total of $424. Under date of March 1, 1915, the plaintiff, by Griffith, signed a paper confirming "prices given you as follows for the Dr. Tamiesie job as per list submitted * * Heating $676 net * * Plumbing $864 net." It will therefore be assumed that the price agreed to be paid by Tamiesie for the labor and materials was $1,964 of which amount $1,540 was to be paid for the materials instead of $1,659.97 the amount which the plaintiff alleges is the reasonable value. Extras amounting to $12.80 were used so that the total sum chargeable against Tamiesie is $1,976.80.

Tamiesie asserts that the plaintiff was the real contractor for the materials and that Manning was a mere figurehead for the company. It is said that the plaintiff was a member of an association of wholesalers who had some sort of an agreement obligating the members not to sell to anyone except plumbers; and Tamiesie asserts that the plaintiff explained to him that Manning would be used as a mere conduit for the purpose of evading the association agreement. A detailed discussion of the contradictory evidence would not serve any useful purpose, and we therefore content ourselves with the statement that the record has been twice read with care and that our conclusion is that Manning was not in truth the contractor for the mate-

rial. In its brief the plaintiff makes much of the fact that an interlineation was written into the contract by Griffith. The company claims that this interlineation proves that Manning was the real contractor for the material. The plaintiff was itself, however, vitally interested in the interlineation. Manning had filed a petition in bankruptcy on the preceding day and he was indebted to the plaintiff on an open account and the subject matter of the interlineation tended to insure payment to the plaintiff for materials delivered in the name of Manning for the Tamiesie residence.

2. Tamiesie testified that the plaintiff, through its representative, told him he could pay Manning or the plaintiff. This testimony was not denied although there was ample opportunity for denial. Tamiesie acted upon that instruction by making four checks to Manning and one to the plaintiff. The five checks aggregated $1,976.80 or the full amount of the agreed price of the labor and materials plus the extras. The final check was for $976.80 and was made payable to the plaintiff. The other four checks were made payable to Manning who cashed them and paid the money to the plaintiff, except however about $534 which he retained. The amount kept by Manning exceeded the sum which he was to receive for his labor by $110. At all events, the plaintiff had a right, if it wished, to make Manning its agent to receive payment and it cannot now complain if Tamiesie made payments to Manning in reliance upon an express instruction from it.

3. Evidence offered by Tamiesie upon the question of who was the contractor tended directly to negative the allegation that Manning was the contractor and tended to establish a circumstance or fact which was inconsistent with the allegations in the complaint.

We think the instant case conforms with the rule applied in *Horn* v. *Davis*, 70 Or. 498 (142 Pac. 544). The decree appealed from is affirmed. AFFIRMED.

McBRIDE, C. J., BEAN and JOHNS, JJ., concur.

Argued on demurrer to alternative writ July 26, sustained October 8, 1918.

PAINE *v.* WELLS.

(175 Pac. 430.)

Mandamus—Alternative Writ—School Tax Levy—County Assessor.

1. An alternative writ of *mandamus* against county officers to compel levy of a special school tax, failing to show in what three public places notices required by Section 4083, L. O. L., were posted, or that Laws of 1915, page 285, requiring publication of notice of school meeting, had been complied with, is insufficient.

Mandamus—Alternative Writ—Sufficiency.

2. An alternative writ of *mandamus* against county officers to compel levy of the full amount of special school tax voted, but failing to show that the district is not of the third class, or that the tax was not lowered by the district boundary board of the county under Laws of 1917, page 402, providing therefor in third-class districts, is insufficient.

Mandamus—Alternative Writ—Sufficiency.

3. An alternative writ of *mandamus* to compel county officers to levy a special school tax, failing to allege refusal to extend all of the tax, but not designating the part omitted from the rolls, is insufficient.

Mandamus—Sufficiency of Alternative Writ.

4. An alternative writ against the county assessor to compel the levy of a proposed voted school tax, which fails to allege that the tax would not exceed that of the preceding year by more than 6 per cent to comply with Laws of 1917, pages 192, 194, Sections 8, 12, is insufficient.

Mandamus—Laches.

5. *Mandamus* to compel county officers to levy a voted school tax, not filed until more than three months after the first half of the taxes were due, would, if granted, confuse the financial business of the county, and must be denied for laches.

[As to *mandamus* against public officers, see note in 98 **Am. St. Rep.** 863.]

Original proceedings in Supreme Court.

Department 2.

This is a proceeding in *mandamus,* instituted in this court to compel the assessor, sheriff and clerk of Morrow County, Oregon, to correct the assessment-rolls for the tax of 1917, "by calculating the rate per cent of the special tax voted by School District No. 25 of Morrow County, Oregon, on the twenty-seventh day of November, 1917," and to levy and extend the said special tax on the assessment-rolls, and to certify and issue a warrant for, and collect the same with the tax for 1917. The petition was filed and an alternative writ of *mandamus* was issued on July 11, 1918, requiring the defendant officers to so correct the assessment-rolls, or show cause, on the twenty-third day of July, 1918, why they should not do so.

The formal allegations of the alternative writ show that the plaintiff C. C. Paine is a citizen and taxpayer of the school district; and that School District No. 25 is a public corporation of Morrow County; and shows the official character of the defendant county officers; and names the duly qualified and acting members of the school board of the district and the clerk of the school district. The writ then sets forth in substance as follows:

"IV.

"That on the fifth day of November, 1917, J. C. Ballenger, Clerk of said School District No. 25 of Morrow County, Oregon, posted a notice signed by himself and the chairman of the Board of Directors of said School District on the schoolhouse door in said School District calling a school meeting to be held in said school district on the twenty-seventh day of November, 1917, at 2:00 o'clock P. M. The said J. C. Ballenger sent a copy of said notice to the County School Superintendent of Morrow County, Oregon, and the said J. C. Ballenger on the fifth day of November, 1917, posted three other

notices of the call for said school meeting in said school district to be held on the said twenty-seventh day of November, 1917, in three public places in said school district."

Here follows a copy of the notice of the school meeting to be held on the twenty-seventh day of November, 1917, at 2 o'clock P. M. to vote on the proposition of a special levy of tax setting forth an estimate or budget of the money needed by the district during the fiscal year, showing the amount of $22,761.95 to be raised by a direct tax. It is then alleged:

"V.

"That on the twenty-seventh day of November, 1917, a special school meeting of School District No. 25 of Morrow County, Oregon, was held at 2 P. M. on said day, and at said meeting it was voted by the residents, inhabitants and taxpayers of said School District, who are the electors thereof to raise by taxation the sum of $22,761.95 to be used by the said School District for school purposes during the fiscal year beginning June 30, 1917, and ending June 30, 1918."

It is then alleged that notices of the amount of the special tax voted on at such school meeting, together with a copy of the notice calling the school meeting with itemized budget attached, was filed; one copy with the county clerk, and one copy with the county assessor of Morrow County, before the first day of December, 1917, and that the county assessor has failed and refused to compute and determine the rate per cent of the special tax required to be levied upon the property of the school district as voted, and failed and refused to extend the special tax upon the present assessment-rolls of the county, or to levy said tax upon the property situated in the school district.

Paragraphs IX and X of the writ are as follows:

"IX.

"The County Assessor of Morrow County, Oregon, certified and filed with the County Clerk of said County a false and incorrect certificate of the several amounts of special School taxes voted by the taxpayers of School District No. 25 of Morrow County, Oregon, to be apportioned and assessed upon the property situated in said School District, and the said assessor procured from the County Clerk of said County a warrant in the name of the State of Oregon, authorizing the collection by the Tax Collector of the taxes shown in the said Certificate filed with the County Clerk of Morrow County, Oregon, by the said assessor.

"X.

"The said assessor of Morrow County, Oregon, filed with and delivered to the tax collector of said county an incorrect and false assessment-roll in that the said assessment-roll does not contain the special tax voted by the taxpayers of said School District No. 25 of said County and State, on the twenty-seventh day of November, 1917."

And alleges that the county clerk of Morrow County refuses to issue a warrant authorizing the collection of this special school tax and that the county tax collector of Morrow County refuses to collect the special tax voted by the taxpayers of the School District No. 25.

The defendants demurred to the writ upon the grounds that the same does not state facts sufficient to entitle the petitioners to the relief demanded, specifying several particulars. That these proceedings were commenced too late. DEMURRER SUSTAINED.

Mr. John F. Reilly and *Mr. Sam E. Van Vactor,* for the demurrer.

Mr. O. R. Richards and *Mr. Norman S. Richards, contra.*

BEAN, J.—1. The first ground of the demurrer is based upon several propositions, a portion of which we will notice. It is contended by the counsel for defendants that essential allegations are omitted from the writ and without them the writ does not make that clear case required by the law. The necessary averments in an alternative writ of *mandamus* are stated in 13 Ency. of Pleading and Practice, pp. 677–681, substantially as follows: That the pleading must show, at least *prima facie,* a clear right existing in the relator to have the thing done which he seeks to enforce. It must allege the performance of conditions precedent; it must show special interest and special damage, if any, to the relator; it must negative any facts which under the statute relied upon might defeat his right to maintain the action. We quote from page 680 of that volume:

"The relator must show that it is the respondent's duty, and that he has the power, to perform the act sought to be enforced. The relator must allege the facts from which the legal liability results, and a pleading is had in substance if the duty does not in all cases result from the facts stated in it."

See, also, *State ex rel. Good* v. *Johns,* 170 Ind. 233 (84 N. E. 1); *Hoxie* v. *Somerset County Commrs.,* 25 Me. 333; *Ewing* v. *County Commissioners Court,* 83 Tex. 663 (19 S. W. 280); *Weir* v. *State,* 161 Ind. 435 (68 N. E. 1023); 2 Spelling on Inj. and Ext. Rem. (2 ed.), § 1645; *McLeod* v. *Scott,* 21 Or. 94 (26 Pac. 1061, 29 Pac. 1); *State ex rel.* v. *Malheur County Court,* 46 Or. 519–522 (81 Pac. 368); High's Ext. Legal Rem. (3 ed.), § 9.

The petitioners base their right to the writ upon a school election at which they allege the tax levy was voted. The defendants make the objection that the

petitioners have failed to allege the holding of a legal meeting. Section 4083, L. O. L., provides that all regular and special school meetings must be convened by a written call stating the objects of such meeting, signed by the chairman of the board and the district clerk, or a majority of the district school board; and the directors shall cause the clerk to post the written notices in three public places in the district at least ten days before the day appointed for such meeting.

Chapter 217 of the Gen. Laws of Oregon, 1915, p. 285, provides for a more adequate notice for school district meetings and for the publication of a budget. Section 2 of this act provides that:

"It shall be the duty of the district clerk of any district at least two weeks before a meeting is held for the purpose of levying taxes to publish in one or more newspapers published in the district and having a general circulation, a budget statement of the estimated amount of revenue required for the ensuing year for the maintenance of the school district, and in districts in which no newspaper is published the clerk shall post such budget on the door of the schoolhouse in said district at least ten days before such meeting. It shall be the duty of the directors of any such district to make out and deliver to the district clerk of their district, an itemized statement of the amount of revenues which may be required for the purpose of carrying on the district schools for the ensuing year, which statement shall be signed by the board of directors at a legally called board meeting."

There is no allegation in the writ that the directors caused the clerk to post the notices. It is alleged that the notices were posted "in three public places in said school district." It is objected that this is a mere conclusion of law, and that the writ should show where the notices were posted. What appears to be the budget of the district is contained in the notice of the election, but there is no allegation that the budget

statement of the estimated amount of the revenue required by the district for the ensuing year was published in any newspaper, nor that there is no newspaper published in the district. These suggested defects could possibly be cured by amendment. We therefore pass them.

2. Chapter 206, Laws of 1917, p. 402, which gives to school districts the power to levy taxes, provides that a tax levied by a district of third class "may be reviewed and lowered by the district boundary board of the county." For this purpose an itemized budget showing contemplated expenditures is required to be submitted to the county superintendent of schools. The authority to levy a tax given by the legislature to a school district of the third class is restricted by this statute. There can be no question of the sovereign power of the state through the legislature to control its school districts. There is no allegation in the writ as to whether or not the school district is a district of the third class, nor that the tax was not lowered by the district boundary board. From the amount received from the county school fund, and from the state school fund, mentioned in the budget statement, we think the district must belong to the third class.

The brief of the defendants states that it was admitted by the petitioners upon the argument that the district boundary board had lowered the levy.

3. As we understand the averments of the writ, the county assessor did not fail to extend on the assessment-rolls all of the special tax voted by School District No. 25, but that he gave to the clerk "an incorrect certificate of the several amounts of special school taxes voted by the taxpayers of School District No. 25 of Morrow County, Oregon." This conclusion is apparent from the allegation that the assessor "failed and refused to levy and extend on the present assess-

ment-rolls of Morrow County, Oregon, the special tax voted on the twenty-seventh day of November, 1917," when taken in connection with the other allegations. The writ does not allege that the assessor failed or refused to extend all of the tax, or in other words what part of the tax was omitted from the rolls is not disclosed by the writ. If our construction of the averments of the writ is correct, then the writ should show to what extent or amount the assessor failed to extend the school tax on the assessment-rolls, and it should be averred that the school tax in question has not been lowered by the district boundary board, or else facts should be alleged showing that the boundary board had no authority to review the tax levy. In other words, the writ should negative the existence of facts which would excuse the performance by the county officers, of the acts sought to be enforced.

4. There is no allegation in the writ that the proposed tax would not exceed that of the preceding year by more than 6 per cent, nor is there any allegation that if the tax is more than 6 per cent in excess of the previous year's tax, that there was a compliance with Sections 8 and 12 of the Act of 1917, Gen. Laws of Or. 1917, p. 192. This act provides for the manner in which an election shall be held to authorize an increase, if the tax levy is more than 6 per cent in excess of the preceding year's levy, so that the tax will not come within the constitutional inhibition as to the amount. The act provides that before such an election can be held a certificate of necessity for the increase shall be prepared and filed by the school board. The writ discloses no compliance with this act.

5. The major obstacle in the way of granting the relief prayed for by the petitioners is that the writ was applied for at such a late date that it would create much

confusion and uncertainty in the levying and collection of the tax. The tax-roll under the law had passed from the assessor's hands and a warrant authorizing the collection of the taxes had been issued and the tax-roll placed in the hands of the sheriff for collection. One half of the taxes upon the roll were due April 5, 1918. It is to be presumed that a large portion of the first half has been paid and receipted for by the tax collector. The writ was not petitioned for until more than three months had expired after one half of the taxes were due. Laches is a bar to *mandamus,* and a petitioner desiring to avail himself of the benefits of such a writ must act promptly: *Eastern Cherokees,* 220 U. S. 83–87 (55 L. Ed. 379, 31 Sup. Ct. Rep. 373). It is well settled that application for a writ of *mandamus* must be made within a reasonable time after the alleged default or neglect of duty, and that laches or delay in making an application unless satisfactorily explained may afford sufficient cause for its denial, particularly when the delay has been prejudicial to the rights of the respondent: 18 R. C. L., § 286, p. 335; *Alleghany County Board of Commrs.* v. *County Commrs.,* 20 Md. 449, 460.

The writ charges that the assessor filed a false and incorrect certificate of the several amounts of school taxes, and procured a warrant authorizing the collection of taxes as shown by the certificate. The theory of the writ appears to be that the rolls are false and therefore illegal. It attempts to substitute for the rolls upon which the sheriff is collecting taxes a different roll in so far as the property in School District No. 25 is concerned. It is manifest that the change cannot now be made without causing great confusion in the transaction of the financial business of the county by the county officers, and tending to impede the

administration of the tax laws: *Kinlein* v. *Mayor etc. of City of Baltimore,* 118 Md. 576 (85 Atl. 679); *McCormick* v. *City of New Brunswick,* 89 N. J. L. 117 (97 Atl. 777); *People ex rel.* v. *Olsen,* 215 Ill. 620 (74 N. E. 785); *Board of Education* v. *Common Council,* 128 Cal. 369 (60 Pac. 976); *Bibb* v. *Gaston,* 146 Ala. 434 (40 South. 936). The facts in this case as disclosed by the alternative writ are widely different from those in the case of *State ex rel.* v. *Johnson,* 80 Or. 107 (156 Pac. 579), relied upon by counsel for petitioners.

The demurrer to the alternative writ should be sustained. And it is so ordered.

DEMURRER SUSTAINED.

McBRIDE, C. J., HARRIS and JOHNS, JJ., concur.

RULES

OF THE

SUPREME COURT

OF

OREGON.

Revised—To Take Effect September 3, 1918.

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PREFACE.*

It is not the purpose of these rules to redeclare statutory requirements. Litigants must consult the statutes and follow the procedure prescribed by the legislature; and although it is not the office of the following body of rules to teach litigants how to appeal to the Supreme Court it may nevertheless aid in arriving at a proper understanding of the rules promulgated by the court if attention is directed to some of the statutory requirements.

An appeal is heard upon the record made in the trial court. In the language of Section 556, L. O. L., a judgment in an action at law is reviewed "upon the transcript," and an appeal from a decree in a suit in equity is tried upon "the transcript and evidence accompanying it." The term "transcript" was originally used in its literal sense, when the code was adopted in 1862, for the word was then employed to mean a copy of the entire judgment-roll. While the term "transcript" is retained in the code it does not now always mean the same thing as it did at first, for now the originals of pleadings and bills of exceptions,

*NOTICE TO ATTORNEYS.

Your attention is directed to material changes in the following rules: 2, 3, 5, 10, 11, 12, 19, 22, 23 and 25.

Rules 5 and 10, relating to the bill of exceptions and printed briefs, deserve special notice; also rule 12, *in re* questions to be considered on appeal.

A careful examination of rule 25 is suggested. This relates to the filing of petitions for rehearing and the *printing* of *any argument* in support thereof. The number of copies required is indicated in rule 22.

In the preparation of transcripts on appeal it would be advisable to call the attention of county clerks to rules 1, 2, 3 and 5.

instead of copies thereof, may be filed and when thus brought into this court they "shall be a part of the transcript." In actions at law the statutory provision always has been that the only means by which the evidence can be brought into this court is a bill of exceptions, and that is part of the judgment-roll (L. O. L., Section 208); and hence whatever evidence is stated in the bill of exceptions necessarily appeared in a transcript or copy of the judgment-roll. The original bill of exceptions, instead of a copy, is now sent to the Supreme Court. The evidence in a suit in equity is delivered to the appellant and such evidence is filed with and "shall be deemed a part of the transcript or abstract."

Turning now to Section 554, L. O. L., as amended by Chapter 320, Laws 1913, it will be seen that the appellant must file "a transcript or such an abstract as the law or the rules of the appellate court may require, of so much of the record as may be necessary to intelligibly present the question to be decided by the appellate tribunal, together with a copy of the judgment or decree appealed from, the notice of appeal and proof of service thereof, and of the undertaking on appeal." Formerly in civil cases an appellant was required to file a certified copy of the entire judgment-roll; but now the appellant is required to furnish only such part of the judgment-roll as is necessary intelligibly to present the question to be decided. At first the copy of the judgment-roll was certified by the clerk, while the statute now permits the court to make rules allowing printed abstracts. However, in actions and in suits there must be a certified copy of the judgment or decree appealed from, the notice of appeal and proof of service thereof, and of the undertaking on appeal. In this connection it is proper to call at-

tention to Chapter 335, Laws 1913, where it is provided that "when an appeal is perfected the original pleadings and the original bill of exceptions shall be sent by the clerk, or other proper officer of the trial court, to the clerk of the Supreme Court or appellate court, and shall be a part of the transcript in the Supreme Court or appellate court so long as it may be needed there * * ."

In brief, upon the appeal being perfected in civil cases, the appellant must:

1. File a certified copy of the judgment or decree appealed from, the notice of appeal and proof of service thereof, and of the undertaking on appeal. This is jurisdictional and hence indispensable;

2. File "a transcript or such an abstract as the law or the rules of the appellate court may require." Rule No. 6 provides for a printed abstract and its contents;

(a) If the appeal is from a judgment in an action at law, then Chapter 335, Laws 1913, avoids the necessity of a copy of the bill of exceptions by requiring the original bill of exceptions to be sent to the Supreme Court.

(b) If the appeal is from a decree in a suit in equity, the evidence heard in the trial court is filed in the Supreme Court and "deemed a part of the transcript or abstract."

When an appeal is taken from a judgment in a criminal action, Section 1621, L. O. L., as amended by Chapter 255, Laws 1913, requires a "certified copy of the notice of appeal, certificate of cause, if any, and judgment-roll * * " to be transmitted to the clerk of the Supreme Court. Section 1582, L. O. L., provides for a judgment-roll in criminal actions, and, as in civil actions, the judgment-roll includes a bill of exceptions if there be one; and hence Section 1621, L. O. L., as amended, must be read in connection with Chapter 335, Laws 1913.

RULES

OF THE

SUPREME COURT

OF

OREGON.

RULE 1. In civil cases the copy of the judgment or decree appealed from, notice of appeal and proof of service thereof, and undertaking on appeal shall be prefaced by a page stating the title of the court and cause, and names of the judge and attorneys.

RULE 2. If the appeal is from a decree the original testimony, depositions and other papers containing the evidence heard or offered on the trial shall be certified by the clerk of the court below. This rule should be read and applied in connection with Section 838, L. O. L., as construed in *Sanborn* v. *Fitzpatrick,* 51 Or. 457, 460 (91 Pac. 540).

RULE 3. Every transcript shall be on legal-cap size paper, and typewritten on one side only, or printed on both sides, and in criminal cases, when no printed abstract is filed, shall be chronologically arranged, and prefaced with an index specifying the first page of

each separate paper, order or proceeding, and shall be made in substantially the following form:

STATE OF OREGON, Respondent,
v.
JOHN DOE, Appellant.

Appeal from the Circuit Court of —— County; Honorable —— ——, Judge.

A. B., Attorney for Respondent.

C. D., Attorney for Appellant.

Be it remembered, that on the —— day of ——, 191—, the grand jury of the county of —— presented an indictment against the defendant, charging —— —— with the crime of (or if the sufficiency of the indictment is questioned, set it out in full), committed on the —— day of ——, 191—, the defendant being arraigned (set forth the motion, demurrer or plea in concise form).

And the court on the —— day of —, 191—, (set forth the ruling of the court on the demurrer, motion or plea).

And on the —— day of ——, 191—, the defendant was tried, and the jury found —— guilty, whereupon the court, on the —— day of ——, 191—, sentenced —— to (set forth the sentence in brief), from which judgment the defendant on this —— day of ——, 191—, filed a notice of appeal.

RULE 4. In criminal causes the appellant shall set out in full, in his first brief, the errors alleged.

RULE 5. Transcripts and testimony must be paged by numbering the leaves consecutively on the bottom of the leaf near the left corner, and the name of the paper or witness must be written thereon on the left margin near the bottom thereof. The testimony must

be preceded by an index in which shall be noted the first page of the testimony of each witness. All exhibits must also be indexed, giving the page of the record where offered in evidence. The exhibits referred to in a bill of exceptions must be attached thereto unless, on account of their bulk or other reason, it shall be impracticable in the judgment of the trial judge; but in such case they shall be identified by his certificate. No transcript shall be filed by the clerk unless prepared in compliance with the foregoing rules, except by special order of the court or one of the justices thereof. The bill of exceptions and original pleadings will be returned to the Circuit Court by the clerk of this court on the demand of either party at any time after the mandate is issued. (Chapter 335, Laws 1913.)

RULE 6. Within twenty days after the transcript is filed in a civil case the appellant shall serve upon the attorney for each respondent a printed abstract, prepared as hereinafter provided, containing a copy of so much of the record, as may be necessary to a full understanding of the questions presented for decision, and within five days after service of the abstract the appellant shall file with the clerk of this court sixteen copies thereof, accompanied with proof of such service. In case of cross appeals, the party first giving notice of appeal shall be considered the appellant under this rule. In criminal cases, a printed abstract may be served and filed, or not, as the appellant may elect. No case shall be docketed for hearing unless this and other rules are complied with, except by order of the court.

RULE 7. If the respondent shall deem the appellant's abstract imperfect or unfair, he may, within ten

days after receiving a copy thereof, deliver to the appellant's counsel one, and to the clerk of this court, with proof of service upon appellant, sixteen printed copies of such further or additional abstract as he shall deem necessary to a full understanding of the questions involved in the appeal.

RULE 8. Within twenty days after the service of the abstract, as required by Rule 6, and within the same period after the transcript is filed in criminal cases, if no abstract is served, the appellant shall serve upon the attorney for each of the respondents one copy of his brief. Within twenty days thereafter the respondent shall serve upon the attorney for each appellant one copy of his brief and within ten days thereafter the appellant shall serve upon the attorney for each respondent a copy of such reply brief as he may desire. In all cases sixteen copies of each brief shall be filed with the clerk within five days after service thereof, accompanied by proof of such service. A failure by appellant to comply with this rule within the time required, or such modification thereof as may be made, shall be considered a cause for affirmance or dismissal of the appeal and a failure of respondent as a waiver of the right to be heard. In all cases whether at law or in equity the appellant must file the first brief and shall be entitled to open and close the argument.

RULE 9. All abstracts and briefs shall be printed upon unruled white paper, preferably antique ledger or similar paper, either from eleven-point or twelve-point type, leaded with two-point or three-point leads. The size of the page must be trimmed to six and one-quarter by nine and one-half inches, and the printed page shall be twenty-two by thirty-nine ems, pica,

exclusive of folio at head of page; the outer, top and bottom blank margins of each page to be one and one-half inches wide. The cover, or the first page, if no cover is used, shall set forth the title of the case, designating the appellant and respondent, the court from which the appeal is taken, the name of the judge who presided, and of counsel for the respective parties, and the party in whose behalf the same is filed, whether appellant or respondent. The cover shall have sufficient space reserved for the clerk's filing mark.

RULE 10. Every brief of more than twenty pages shall contain on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited.

The printed brief shall contain a general statement of so much of the facts as shall be material and relevant to the questions raised by the appeal. The brief shall also state, separately from the argument, the several propositions of law claimed to be involved in the case and the authorities relied upon for the support of the same. The points and authorities must be first distinctly stated and the argument set forth supplementary thereto. When an authority cited is an adjudicated case, the names of the parties, the volume in which reported, and the particular page or pages containing the matter to which it is desired to call the attention of the court must be set out. When reference is made to a text-book, the number or date of the edition should be stated, with the number of the volume, section and page.

Either in the statement of facts or in the argument the briefs shall clearly point out the evidence relied

upon by appropriate reference to the page or pages of the record where found and to any material exhibit.

The briefs shall avoid unnecessary repetition either of facts or of argument.

Arguments by *amici curiae* shall be by printed briefs only.

RULE 11. The printed abstract of the record must be accompanied by a complete index of its contents, and shall be made substantially in the following form:

In the Supreme Court of the State of Oregon

—— Term, 191—.

JOHN DOE, Appellant (or Respondent),
v.
RICHARD ROE, Respondent (or Appellant).

APPELLANT'S ABSTRACT OF RECORD.

Appeal from the judgment of the Circuit Court for —— County; Hon. —— ——, Judge.

A. B., Attorney for Appellant.

C. D., Attorney for Respondent.

On the —— day of ——, 191—, the plaintiff filed in the Circuit Court for —— County a

COMPLAINT.

Stating his cause of action (or suit) as follows: (Set out all of the complaint necessary to an understanding of the questions to be presented to this court, and no more. In setting out exhibits, omit all merely formal irrelevant parts; as, for example, if the exhibit be a deed or mortgage, and no question is raised as to the acknowledgment, omit the acknowledgment. When the defendant has appeared, it is useless to encumber the abstract with the summons, or the return of the officer. Append to the abstract of each paper a reference to

the page of the transcript on which it will be found.)

On the —— day of ——, 191—, the defendant filed a

DEMURRER

To the said complaint, setting up the following grounds: (State only the grounds of demurrer, omitting the formal parts. If the pleading was a motion, and the ruling thereon is one of the questions to be considered, set it out in the same way, and continue.)

And on the —— day of ——, 191—, the same was submitted, and the court made the following ruling thereon: (Here set out the ruling. In every instance, let the abstract be made in the chronological order of the events in the case and each ruling appear in the proper connection. If the defendant pleaded over, and thereby waived his right to appeal from the ruling, no mention of it should be made in the abstract; and if no question is to be raised on the appeal growing out of the rulings of the court upon motions or demurrers, no mention should be made of them in the abstract, but it should continue.)

And on the —— day of ——, 191—, the defendant filed his

ANSWER

As follows: (Here set out so much of the answer as may be necessary to explain the questions raised on the appeal, and no more, omitting all formal parts. If motions or demurrers were interposed to this pleading, proceed as directed with reference to the complaint. Frame the record so that it will properly present all questions to be reviewed and raised before issue was joined, and none other. When the abstract shows issue joined, proceed.)

On the —— day of ——, 191—, said cause was tried by a jury (or the court, as the case may be).

VERDICT.

On the —— day of ——, 191—, the jury returned into court with the following verdict: (Set out the verdict, if necessary to a perfect understanding of the questions presented; if not, state the party in whose favor rendered. If the cause was tried by the court, the findings should be set out in like manner.)

And on the —— day of ——, 191—, the following

JUDGMENT (OR DECREE)

Was entered: (Set out the judgment or decree appealed from, or so much thereof as may be necessary.)

ASSIGNMENTS OF ERROR.

And the appellant herein says there is manifest error on the face of the record in this: (Here assign and set out briefly and concisely the errors relied upon for a reversal or modification of the order, judgment, or decree appealed from.)*

RULE 12. On the hearing in this court, no questions will be examined or considered at the instance of appellant, except those going to the jurisdiction of the court, or when the pleading does not state facts sufficient to constitute a cause of action or defense, or those arising upon the assignments of error as contained in the printed abstract. The court reserves the right in furtherance of justice to notice on its own initiative a plain error of law apparent on the face of the record.

*NOTE.—This outline is presented for the purpose of indicating the character of the abstract contemplated by the rule, which is to be substantially complied with. Of course, no form can be laid down applicable to all cases. The rule to be observed in abstracting the case is, preserve everything material to the question to be decided, and omit everything else.

RULE 13. When for any reason a strict compliance with the rules relating to the preparation and service of abstracts or briefs becomes impossible or inconvenient, and a waiver or modification thereof, or an extension or shortening of the time is desired in any case, the party desiring such waiver or modification or change of time, may at any time before he is in default apply to any justice of this court in vacation, or to the court in term time, for an order directing the same. The application shall be made in writing, and shall set out the particular facts relied upon by the applicant, and shall be certified by counsel as being true and made in good faith. The order, if made by the court, shall be entered in the journal, and if by one of the justices, filed with the clerk. In no case will these rules, or any of them, be waived, suspended or modified upon agreement of counsel only.

RULE 14. The clerk shall file one copy of each abstract and brief in his office; he shall furnish an additional copy to each justice of the court, to the reporter, to the Supreme Court Library and to the Multnomah Law Library.

RULE 15. The printed abstract provided for by these rules shall be deemed and considered an abstract within the meaning of the Code. [L. O. L., § 554.]

RULE 16. If, without reasonable excuse, the appellant fails or neglects to serve and file abstracts or briefs as required by the rules of this court, the respondent may have the judgment or decree affirmed on motion and notice; and in case of an abandoned appeal, the opposite party may have the judgment or decree likewise affirmed on motion by presenting a copy of the judgment or decree, undertaking, notice of appeal, and proof of service thereof.

DOCKETING CAUSES.

RULE 17. After the rules in regard to service and filing abstracts and briefs have been complied with, the cause shall be put upon the trial docket in its proper order.

RULE 18. Civil causes on the trial docket will be set for argument as near as convenient in the order of their entry of which the clerk will notify the attorneys of the respective parties. On the application of either party and notice to the other the court will direct a cause to be set out of its order if it be of sufficient importance in the judgment of the court. By stipulation of the parties any case either civil or criminal may be submitted at any time on printed briefs without oral argument.

RULE 19. Unless otherwise ordered prior to the beginning of the argument, not more than two hours can be employed in the argument of the case. One hour of this time belongs to appellants and may be divided by them as they see fit between the opening and closing arguments. The remaining hour belongs to respondents.

RULE 20. When the briefs are filed in a criminal case or the time for filing or extension thereof has elapsed, the clerk shall set the same for hearing unless otherwise directed by the court. All briefs on either side of a criminal case must be served upon the attorney general, as well as upon the attorney for the adverse party, and proof of service must be indorsed on one of the copies filed with the clerk.

WITHDRAWING PAPERS.

RULE 21. No paper on file with the clerk shall be taken from the courtroom or office of the clerk, except

by order of the court or one of the justices; *provided,* either party may withdraw the transcript of the record and testimony for the purpose of making abstracts or briefs upon giving a receipt therefor to the clerk, and upon such withdrawal may retain the same for ten days.

RULE 22. All motions, including petitions for rehearing, must be submitted without oral argument unless otherwise ordered by the court, and eight copies thereof, together with a like number of supporting typewritten or printed briefs, with proof of service on both motion and briefs, shall be filed with the clerk; *provided,* that all briefs in support of or opposed to motions for rehearing shall be printed.

RULE 23. All motions and papers supplemental or opposed thereto must be filed with the clerk and served on the opposite party or his attorney, who, within ten days from such service, may serve and file an answering paper. The moving party, after being served with an answering paper, may, within five days, serve and file a reply. All motions must be filed within ten days after a party or his attorney obtains knowledge of an alleged failure of the adverse party or his attorney to comply with the requirements of the statute or with the rules of this court, and unless so filed all defects, except objections to the jurisdiction of the court, will be taken as waived by the moving party.

RULE 24. An application to this court or a justice thereof for an order enlarging the time in which to file a transcript shall be accompanied by a stipulation of the respondent consenting thereto or by proof of notice to respondent of such application at least five days before the same is made; *provided, however,*

that when the time in which to file the transcript will expire by limitation before such notice can be given, the court or a justice thereof may enlarge the same sufficiently to enable the required notice to be given.

RULE 25. All applications for rehearing shall be by typewritten or printed petition, signed by counsel, setting forth without argument wherein it is claimed the court has erred, and shall be filed within twenty days after the filing of the opinion. Counsel may accompany the petition with a printed brief of the authorities upon which they rely in support thereof, but no oral or typewritten argument will be heard or considered thereon. It will not be necessary for the adverse party to answer such petition unless requested to do so by the court, but such answer must be printed. No disbursement will be allowed in favor of either party for a petition or briefs on an application for a rehearing.

RULE 26. The filing of a petition for a rehearing shall suspend further proceedings under the decision until the petition is disposed of, unless the court in term time, or one of the justices in vacation, shall otherwise order. [39 Or. 525.]

RULE 27. Within twenty days from the time an opinion is rendered in a cause, or if no opinion is handed down, then within twenty days from the giving of a decision, the party entitled to costs may serve on the adverse party or his attorney, or if neither can be found in the county where the cause was tried, then upon the clerk of the trial court thereof, a verified claim of the costs and disbursements demanded, and file the bill therefor, with proof of service indorsed thereon, with the clerk of this court.

MANDATE.

RULE 28. Upon the disposition of a petition for rehearing or if within twenty days after final judgment or decree no petition shall have been filed; the clerk shall, as a matter of course, unless he is directed by the court otherwise, issue and forward a mandate to the clerk below.

COSTS.

RULE 29. It shall be the duty of the clerk in taxing costs to allow the prevailing party the actual cost of printing his abstract or brief (for not exceeding forty copies). But he shall not allow exceeding $1.00 a page, including cover, when printed in twelve-point type, and $1.15 a page when printed in eleven-point type, unless for special reasons apparent in the record it shall be otherwise ordered.

RULE 30. Costs and disbursements in this court will be taxed by the clerk, and his allowance or rejection, and all objections thereto, shall stand as the determination by the court, unless the party affected thereby shall within ten days after such taxation move to retax the same.

Sections 569 and 570, L. O. L., do not apply to the taxation of costs in this Court: *Heywood* v. *Doernbacher Mfg. Co.*, 48 Or. 359.

No cost bill need to be filed to recover the filing, attorney fee and trial fee: *Anderson* v. *Adams*, 44 Or. 529.

When no part of an item in a cost bill is proper, it will be disallowed without an objection by the adverse party: *Sommer* v. *Compton*, 53 Or. 341.

As to "padded" abstracts or other papers, see *Ferguson* v. *Byers*, 40 Or. 465.

An overcharge in a proper item of a cost bill should be objected to, and unless objections are filed the whole bill will be allowed, unless the amount charged exceeds the maximum allowed by law or the rules of this court: *Sommer* v. *Compton, supra.*

The cost of transcribing the stenographer's notes for a bill of exceptions can not be allowed in this Court: *Sommer* v. *Compton, supra; Allen* v. *Standard Box Factory*, 53 Or. 10.

RULE 31. The clerk shall not tax costs for any matter included in the transcript contrary to these rules, unless specially directed by the court; nor shall any costs be taxed unless the cost bill therefor shall be filed before the mandate is issued, except for fees paid the clerk and for attorney fees.

PRACTICE.

RULE 32. The mode of review of final decisions of the circuit court, when the course of proceeding is not specifically pointed out by statute, shall be by appeal as in actions at law, but questions of fact shall not be considered upon such appeal, unless made a part of the record by a bill of exceptions.

WRITS OF ORIGINAL JURISDICTION.

RULE 33. No writ of *habeas corpus,* or other writ of original jurisdiction will issue from this court when the applicant has a full, speedy, and adequate remedy in the Circuit Court, except by permission of the court, or a justice thereof, on notice to the adverse party.

All applications for such writs must be served upon the adverse party before being filed, and be accompanied by a typewritten or printed memorandum of the points involved, and the authorities relied upon: *Ex parte Jerman,* 57 Or. 387 (112 Pac. 416).

STAYING PROCEEDINGS.

RULE 34. All applications for stay of proceedings, in cases on appeal, must be served upon the adverse party, with notice of the time when the same will be presented.

DIMINUTION OF RECORD.

RULE 35. For the purpose of correcting any error or defect in the transcript from the court below, either

party may suggest the same, in writing, to this court, and, upon good cause shown, obtain an order that the proper clerk certify up the whole or part of the record, as may be required; or the same may be corrected by stipulation of counsel, in writing, filed with the clerk before argument. If the attorney of the adverse party be absent, or if the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

PAPERS, ORIGINAL—HOW BROUGHT UP.

RULE 36. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district, that original papers or exhibits of any kind should be inspected by this court, such judge may make an order for the safekeeping, transporting and return of such papers or exhibits as to him may seem proper, and this court will receive and consider such papers or exhibits in connection with the transcript of the proceedings.

PENDLETON TERM.

RULE 37. The foregoing rules will apply both at Salem and Pendleton, except that the clerk will not give notice of hearings at the latter place.

No cause will be heard at Pendleton unless the time for filing the respondent's brief has expired at least ten days prior to the beginning of the term of court there. Cases transferred from Pendleton to Salem for trial will be placed at the foot of the docket to be heard in the order of docketing, unless otherwise directed by the court.

ADMISSION TO THE BAR.

RULE 38. The examination of all applicants for admission to practice in this state shall be conducted by a board of examiners under the direction of the Supreme Court, which board shall be composed of five members of the Oregon bar in good standing, to be nominated by the president of the Oregon Bar Association and confirmed and appointed by the Supreme Court, for a term of three years from date of appointment. No member of said board shall receive student candidates in his office in preparation for call to the bar or be connected with the faculty or governing body of any law school presenting candidates for admission. The second day of the October term, and the last Tuesday in May, at Salem, shall be set apart as the time in which applicants for admission to practice as attorneys in the courts of this state may appear before the court for examination. No examinations will be held at Pendleton.

RULE 39. Each application for admission shall be filed with the clerk of the Supreme Court not less than sixty days prior to the date of the examination, and shall be accompanied by a certificate showing that the applicant is a graduate of some college, high school, or other literary institution of approved standing signed by the head of such institution. In event that the applicant is not a graduate of any such institution, then he shall be required to pass such examination covering his literary training as said board, under the direction of the court, shall prescribe. Each application shall also be accompanied by the certificate of some attorney in good standing at the Oregon bar, showing that said applicant has studied law for three years, together with the affidavits of three responsible

citizens, two of whom shall be members of the bar, which affidavits shall set forth how long a time, when and under what circumstances those making the same have known the candidate, and shall show that he is a person of good moral character. Each applicant shall also file his own affidavit showing that he is a citizen of the United States and of this state, or has complied with the statutory requirements in that connection, and is over the age of twenty-one years. Such affidavit shall also contain a list of the law books which he has studied. If, however, such applicant produces a diploma from any approved law school requiring at least a three years' course of study, or shows that he is a graduate thereof, then he shall not be required to furnish a certificate showing the length of time during which he has studied.

RULE 40. All applicants whose applications shall, in the judgment of the board, or court, conform to the requirements of the foregoing rule shall be examined by the examiners at the term at which the application is made, as to their requisite general learning in constitutional law, including the constitutions of the United States and the State of Oregon, equity, the law of real and personal property, evidence, decedents' estates, landlord and tenant, mortgages, contracts, partnership, corporations, crimes, torts, agency, sales, negotiable instruments, domestic relations, common-law pleading and practice, state practice, conflict of laws, professional ethics, the federal statutes relating to the judiciary and to bankruptcy, and the development in the State of Oregon of the principles of law, as exemplified by the decisions of its Supreme Court and by statutory enactments. Such examinations shall be conducted in the manner and according

to the method prescribed by said board. No such applicant shall be permitted to practice in the courts of this state, unless at least three members of said board, or the court on appeal from the decision of the board, shall deem such applicant to be duly qualified as to the requisite character, learning and ability. Upon such motion of any three members of said board such applicant shall be admitted subject to the approval and confirmation of the Supreme Court.

RULE 41. Attorneys and counselors at law and solicitors in chancery who have been admitted to practice in the highest courts of any other state, territory or district, or of England, her colonies, or dependencies where the common law prevails, and who are otherwise qualified, may be admitted to the bar of this state without examination upon presenting their certificate of admission to such courts, accompanied by a petition in writing, verified by the oath of the petitioner, showing (1) where he was first admitted to practice, all places and the periods of time during which he has practiced as an attorney or counselor at law, and especially the place, the period of time, and the court before which he last practiced; and (2) whether or not any proceedings for his disbarment or suspension have been instituted or prosecuted at any time or place, and that he has practiced for at least one year in some other jurisdiction. Such petition must also be accompanied by the certificate of the presiding judge of the highest court in which he last practiced, or was admitted to practice, to the effect that the petitioner was in good standing and trustworthy in his profession in such jurisdiction, and also the affidavits of two attorneys of this court showing that they believe him to be a reputable attorney and a person of good moral character, and setting forth how

long a time, when, and under what circumstances those making the same have known the petitioner. Such applicant may be licensed to practice law for a period of nine months from and after the date of such license, upon his temporary admission, and the clerk shall immediately notify the secretary of the Oregon Bar Association of such order; *provided, however,* that if such license would expire during any vacation of this court, then, and in that event, it shall continue in force until the third Monday of the succeeding term of this court to be held at Salem. In the event that any objection is made to the final admission of any person so licensed to practice law in this state, such objection shall be made in writing, setting forth the grounds thereof, and shall be filed with the clerk, who shall transmit the same to the said board of examiners for their action, which action shall be by them reported to the Supreme Court; *provided, however,* that the court may, in its discretion, either continue or revoke the temporary license pending such investigation and report. In case no objection is so made and filed within six months after the making and entry of the order granting the temporary license to practice, then such applicant at any time after the expiration of said six months may, on written motion of three members of said board of examiners, unless otherwise ordered by the court, be permanently admitted to practice law in the courts of this state.

RULE 42. Applicants for admission upon examination shall pay to the clerk $20, and upon certificate $30 before his examination. (General Laws of Oregon, 1913, page 78.)

Section 1081, Lord's Oregon Laws, provides:

"Whenever it appears that a person of any other state or country is an attorney of the highest court of record in such state or country, he may appear as counsel for a party in a particular action, suit or proceeding then pending in court, or before a judicial officer of this state, but not otherwise; *provided, however,* that upon proof that he is a person of good moral character, which may be proved by any evidence satisfactory to the court, he may be admitted generally, by the Supreme Court, as an attorney, in all respects as if he were a citizen of this state, and shall be permitted to practice in all courts of this state; *provided,* that the state or country of which such applicant is a resident or citizen admits to its bar, and to practice in its courts, attorneys who are citizens of this state."

I Hereby Certify, That the foregoing is a true and correct copy of the Rules of the Supreme Court of the State of Oregon, as adopted July 30, 1918, to take effect September 3, 1918.

Dated at Salem, Oregon, July 30, 1918.

ARTHUR S. BENSON,
Clerk of the Supreme Court of Oregon.

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ADEQUATE REMEDY AT LAW

See Mandamus, 1–3.

ADVERSE PARTY.

See Appeal and Error, 40, 41.

AGENCY.

See Mechanics' Liens, 5.
See Principal and Agent.

AGREEMENT.

Principal's Agreement to Convey to Agent.

See Principal and Agent, 4.

AGRICULTURE.

Agriculture—Lien—Construction of Statute.

1. A statute such as Section 7439, L. O. L., creating a lien for the clearing and improvement of land, etc., is remedial, and should be

liberally construed in favor of those for whose benefit it was enacted. (Craig v. Crystal Realty Co., 25.)

Agriculture—Lien—Clearing and Improving Land—Construction of Statute.

2. Under such interpretation a substantial compliance with its requirements is essential to the validity of the notice of lien, and in a suit for its foreclosure the plaintiff by his complaint must bring himself within the purview of the statute. (Craig v. Crystal Realty Co., 25.)

Agriculture—Lien—Clearing and Improving Land—Construction of Statute — "Ditching, Diking or Tiling" — "Diking" — "Clearing Land."

3. Under Section 7439, L. O. L., providing that anyone clearing or improving any land by ditching, diking or tiling at the request of the owner or the lawful possessor shall have a lien on the land for his wages and charges preferred to every other subsequent lien, mortgage or encumbrance, one plowing land and moving the earth so broken up into the low places and preparing the soil for cultivation and making a ditch and removing sagebrush was entitled to a lien; the words "by ditching, diking or tiling" expressing every kind of work necessary to convert parts of arid land, particularly sagebrush lands, into farms and orchards, and the word "diking" as applied to arid regions implying a leveling of the land, and the term "clearing land" as applied to arid regions covered with sagebrush meaning not only the removal or the destruction of the brush but the plowing or breaking up of the roots as well. (Craig v. Crystal Realty Co., 25.)

Agriculture—Lien—Clearing and Improving Land—Request of Owner or Lawful Possessor.

4. In such case, evidence *held* to show that the work done by plaintiff was performed at the request of the owner of the land or by the person in the lawful possession thereof. (Craig v. Crystal Realty Co., 25.)

Agriculture—Lien—Clearing or Improving Land—Owner or Possessor—Ratification.

5. In such case, although the owner did not originally contract with the plaintiff for or consent to the work in clearing the land, yet where by its agent it ratified and approved the work, it subjected the land to the lien. (Craig v. Crystal Realty Co., 25.)

Agriculture—Lien—Clearing and Improving Land—Lien Notice—Statute.

6. Under Section 7440, L. O. L., requiring a lien notice for improving and clearing land to be filed within 60 days after the completion of the work, when the labor required under the original contract was omitted, its final completion pursuant to such agreement dated from the time such omissions were supplied by the lien claimant at the request of the owner, and a notice filed within 60 days after such completion was sufficient. (Craig v. Crystal Realty Co., 25.)

See Drains, 3.

ALTERNATIVE WRIT.

See Mandamus, 4–7.

AMENDMENTS.

See Municipal Corporations, 1, 2, 13.
See Pleading, 2.
See Statutes, 3, 14, 16.

ANIMALS.

Animals—Trespass—Damages—Nominal Damages.

1. Where plaintiff alleged trespass by 700 of defendant's sheep, and defendants denied, except that 80 sheep got away from the herder and trespassed, but were immediately removed, plaintiff was entitled to at least nominal damages; the trespass being admitted. (Boyd v. Grove, 80.)

Animals—Evidence—Damages by Animals—Admissibility of Evidence—Opinion.

2. In action for damages to grass by trespass of sheep, it was pertinent to prove that the supply of feed was limited, and to take the opinion of a qualified witness as to the value of the grass consumed. (Boyd v. Grove, 80.)

Animals—Trespass—Pleading and Proof.

3. Where complaint for trespass alleged usefulness of plaintiff's property for grazing, and that, if overstocked, the grass roots are killed out, and the land permanently injured, and that the trespass so injured the land, there was sufficient foundation for testimony of value of land before and after the trespass. (Boyd v. Grove, 80.)

ANNEXATION.

Manner of Annexation of Personalty to Realty.

See Fixtures, 1–8.

APPEAL AND ERROR.

Appeal and Error—Effect of Appeal—Vacating Decree.

1. The trial court does not lose its jurisdiction to vacate a decree and render a new one because an appeal from the decree has been perfected, prior to the hearing on the appeal. (Oregon-Wash. R. & N. Co. v. School Dist. No. 257.)

Appeal and Error—Dismissal—Vacating Decree Appealed from.

2. Where a decree pending appeal therefrom, but before hearing on appeal, is vacated, and a new decree entered, the latter supersedes the former as the final decree, and is the only one from which an appeal will lie, and the appeal from the former must be dismissed. (Oregon-Wash. R. & N. Co. v. School Dist. No. 257.)

Appeal and Error—Dismissal of Appeal—Want of Sufficiency.

3. Since no more can be done on appeal than to vacate the decree appealed from and render another, where such has been done by the trial court, pending the appeal, from which action no appeal has been taken, there is want of actual controversy, only an academic question remaining, and the appeal must be dismissed. (Oregon-Wash. R. & N. Co. v. School Dist. No. 257.)

Appeal and Error—Review—Harmless Error.

4. Where evidence showed a contract had been rescinded by mutual assent, the admission of parol evidence tending to vary the terms thereof, if error, was harmless. (Woodard v. Willamette Val. Irr. Land Co., 10.)

Appeal and Error—Record—Drainage Establishment Proceeding.

5. Under drainage district law, allowing appeal from County Court to Circuit Court to be taken in the same manner as appeal in an equity case, and Section 556, L. O. L., providing that on appeal from a decree given in any court, suit shall be tried anew on the transcript and evidence accompanying it, appeal from Circuit Court, which dismissed appeal from County Court, which overruled objections to assessment of benefits in proceeding for establishment of a drainage district, will be dismissed, the record not showing the original petition or notice, constituting the process, nor any testimony on the issues, so that it is impossible to give any intelligent attention to appellant's complaint. (Seaweard v. Malheur Drainage Dist., 40.)

Appeal and Error—Matters Reviewable—Demurrer—Grounds.

6. A demurrer on grounds other than the running of limitations does not raise such question on appeal. (Marshall v. Gustin, 53.)

Appeal and Error—Harmless Error—Instructions.

7. In trespass, where one element of damage was expense of cleaning irrigation ditch amounting to two days' wages of one man, error, if any, in instructing thereon was harmless, since "*de minimis non curat lex.*" (Boyd v. Grove, 80.)

Appeal and Error—Permitting Witness to Construe Contract—Harmless Error.

8. Where decision was in harmony with true construction of written contract, permitting a witness who was a party to the contract to construe it was harmless. (Gile & Co. v. Lasselle, 107.)

Appeal and Error—Error Favorable to Complaining Party.

9. In replevin, where plaintiff claimed property in its own right and defendant claimed as bailee for his principal, refusal of plaintiff's requested instruction which would have allowed a recovery of the gross sum of one cent per pound as damages without deduction for necessary expenses and labor, *held*, harmless, since, if treated as a precept for the measure of damages for detention it would have been harmful to plaintiff. (Gile & Co. v. Lasselle, 107.)

Appeal and Error—Instructions not Supported by Pleadings or Evidence—Harmless Error.

10. Where the outcome of the case should have been the same regardless of estoppel, error in giving instruction on estoppel is negligible. (Gile & Co. v. Lasselle, 107.)

Appeal and Error—Execution—"Stay."

11. Where appeal has been perfected, and stay bond, required by Section 553, L. O. L., has been filed, the execution theretofore issued does not become *functus officio*, and the judgment creditor is not compelled to take out a new execution upon giving the counter bond; the words "stay the proceeding" meaning to stop, to arrest, to for-

bear, and not contemplating any affirmative action, such as returning an execution unsatisfied. (Gearin v. Fleckenstein, 146.)

Appeal and Error—Verdicts—Conflicting Evidence.

12. The jury's determination from conflicting evidence that defendant took over all the partnership property under an agreement to pay his partner's debt to plaintiff must be considered final. (Davidson v. Madden, 209.)

Appeal and Error—Harmless Error.

13. That an instruction on one partner's agreement to assume the personal debts of another improperly refers to taking and accepting "the sheep," instead of "an undivided half interest in the sheep," *held* harmless error. (Davidson v. Madden, 209.)

Appeal and Error—Scope of Review—Conflicting Evidence.

14. Where there is evidence upon both sides of the issue, the court on appeal is powerless to disturb the verdict. (First Savings Bank of Albany v. Macneill, 216.)

Appeal and Error—Want of Actual Controversy—Mandamus.

15. In *mandamus* to compel reinstatement of plaintiff in municipal employ, even so late as when the cause reaches the Supreme Court on appeal, the fact of plaintiff's voluntary reinstatement may be made to appear, and the court in such case will refuse to proceed further. (Dryden v. Daly, 218.)

Appeal and Error—Presumptions—Finding of Court.

16. The findings of fact by the trial court sitting without a jury being equivalent to a verdict, the court on appeal must, in the absence of a bill of exceptions, presume that there was evidence to support them. (Thomas v. Peebler, 255.)

Appeal and Error—Record—Matters Reviewable—Evidence.

17. Portions of testimony taken at jury trial, not made a part of the bill of exceptions, and no application having been made to incorporate them cannot be considered on appeal. (Cathcart v. Marshfield, 401.)

Appeal and Error—Record—Matters Reviewable—Instructions.

18. Instructions not made part of bill of exceptions, and not incorporated in record by motion, cannot be considered on appeal. (Cathcart v. Marshfield, 401.)

Appeal and Error—Setting Aside Verdict—Review.

19. Where court granted a motion for new trial without stating reason therefor, error will not be presumed, although specific grounds stated in motion were not good. (Cathcart v. Marshfield, 401.)

Appeal and Error—Undertaking—Failure to Serve.

20. Where appellants regularly served their notice of appeal and filed their undertaking, but failed to serve undertaking on respondent or her attorney, and offered no excuse for such failure, the appeal will be dismissed. (Morrison v. St. Johns Sanitarium, 427.)

Appeal and Error—Review—Findings.

21. Some weight must be given to the fact that the lower court which saw the witnesses determined the issues in favor of defendants. (Rowe v. Freeman, 428.)

Appeal and Error—Dismissal of Appeal.

22. Laws of 1913, Chapter 320, Section 554, subdivision 2, must be read in connection with other provisions, and, where notice of appeal was not served in time, the Supreme Court has no authority to enforce the judgment of the lower court against a surety in the undertaking for a stay of proceedings, but can only dismiss the appeal. (McCarger v. Moore, 597.)

Appeal and Error—Correction of Judgment.

23. Where notice of appeal was not served in time, and the Supreme Court in its judgment attempted to enforce the judgment of the lower court against the surety in the undertaking for a stay of proceedings under Laws of 1913, Chapter 320, Section 554, subdivision 2, rendition of judgment against surety for the amount of the judgment of the Circuit Court is a clerical misprision, which the Supreme Court is authorized to correct after remand. (McCarger v. Moore, 597.)

Appeal and Error—Harmless Error—Evidence.

24. In action for cutting cordwood, error in admitting testimony as to reasonable value of plaintiffs' services was harmless where court evidently disregarded it, and properly adopted contract price as reasonable value of work. (Franconi v. Graham, 619.)

Appeal and Error—Review—Credibility of Witnesses.

25. Supreme Court cannot go into question of credibility of witnesses. (Franconi v. Graham, 619.)

Appeal and Error—Review—Weight of Evidence.

26. The Supreme Court cannot go into the question of the weight of the evidence. (Franconi v. Graham, 619.)

Appeal and Error—Equitable Proceedings—Remand.

27. Where the proceeding is equitable, and the testimony has all been taken, and is before the court on appeal for trial *de novo*, the cause will not be remanded for new trial. (Shepperd v. Holmes, 626.)

Appeal and Error—Recital in Order.

28. Recital of fact in order appealed from imports absolute verity if nothing else is shown, as against unverified assignment of error and statement of counsel in brief. (Anderson v. Anderson, 654.)

Appeal and Error—Affirmance—Reason.

29. Order vacating order opening default and allowing answer will be affirmed, assuming reason given in vacating order to be unsound, the record showing application to open default should have been denied because not accompanied by proposed answer. (Anderson v. Anderson, 654.)

Appeal and Error—Parties—Intervention on Appeal.

30. The Supreme Court is a court of appellate jurisdiction only, and cannot admit interveners who were strangers to the proceeding below, as that would be an exercise of original jurisdiction. (In re Waters of Chewaucan River, 659.)

Appeal and Error—Notice of Appeal—Adverse Parties.

31. Anyone whose rights may be injuriously affected by the modification of a decree is a party adverse to the one appealing, and should be served with notice of appeal. (In re Waters of Chewaucan River, 659.)

Appeal and Error—Notice of Appeal—Parties—Dismissal.

32. A proceeding was commenced before the board of control to determine the relative rights of the users of the water of a river, and on notice numerous users appeared and filed their claims and notices of contest, and after hearings, etc., the record was filed in the Circuit Court, and it entered a decree modifying the findings of the board, from the whole of which decree two of the parties appearing before the board and the Circuit Court separately appealed, but failed to serve notice of appeal upon all the parties appearing in the Circuit Court. Section 6650, L. O. L., as amended by Laws of 1913, page 161, provides that in such proceedings appeals from the decree may be taken to the Supreme Court the same as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the decree, and Section 556 provides that upon an appeal from a decree the suit shall be tried upon the transcript and accompanying evidence. *Held* that, as the rights of all the parties were put in issue by the appeals, the failure to give notice of appeal to all who were parties below deprived the Supreme Court of jurisdiction of the subject matter. (In re Waters of Chewaucan River, 659.)

Appeal and Error—Appellate Jurisdiction—Notice of Appeal.

33. To give the Supreme Court jurisdiction, notice of appeal must be served upon every adverse party. (In re Waters of Chewaucan River, 659.)

Appeal and Error—Right of Appeal—Conditions.

34. The privilege of appeal is not inherent or constitutional, but exists only by virtue of the statute, and if the statute is burdensome in respect to notices of appeal, expenses, etc., it is not the province of the court to amend it or to dispense with its requirements, especially in view of Section 550, L. O. L., as amended by Laws of 1913, page 617, granting the privilege of giving oral notice of appeal in open court at rendition of final decree. (In re Waters of Chewaucan River, 659.)

Appeal and Error—Notice of Appeal—Contents.

35. A notice of appeal should contain enough in its terms to show that the party presenting the same is really a party to the record sought to be reversed or modified. (In re Waters of Chewaucan River, 659.)

Appeal and Error—Right of Appeal—Statute.

36. No appeal exists as a matter of right, but must be founded on statute. (In re Waters of Chewaucan River, 659.)

Appeal and Error—Dismissal of Appeal—Policy of Court.

37. In view of the statute and rules of court which, where good faith is shown, provide for any amendment necessary to perfect appeal after notice of appeal and after Supreme Court has acquired jurisdiction, it is Supreme Court's policy to sustain rather than to dismiss an appeal. (In re Waters of Chewaucan River, 659.)

Appeal and Error—Notice of Appeal—Jurisdiction of Supreme Court —Statute.

38. The appellate court has no legal discretion over the service of the notice of appeal, and to give the Supreme Court jurisdiction on the merits there must be a strict compliance with Section 550, L. O. L., as amended by Laws of 1913, page 617, providing for the service of notice of appeal. (In re Waters of Chewaucan River, 659.)

Appeal and Error—Notice of Appeal—"Party"—Statute.

39. Where all sections of water law were complied with, and, under Section 14, a claimant filed his statement, he became an actor, and appeared and submitted his water right to Circuit Court's jurisdiction for adjudication and to obtain his water right certificate, and was a party to proceeding entitled under Section 550, L. O. L., as amended by Laws of 1913, page 617, and in view of Section 6650 as amended by Laws of 1913, page 161, to notice of appeal. (In re Waters of Chewaucan River, 659.)

Appeal and Error—Notice of Appeal—"Adverse Party."

40. Under Section 550, L. O. L., as amended by Laws of 1913, page 617, an "adverse party" entitled to notice of appeal is every party whose interest in relation to the judgment appealed from is in conflict with a modification or reversal sought by the appeal; every party interested in sustaining the judgment. (In re Waters of Chewaucan River, 659.)

Appeal and Error—Notice of Appeal—"Adverse Party"—Statute.

41. Every claimant who filed his statement with water board in a proceeding under water law, and whose water right was adjudicated by decree of Circuit Court, is bound by that decree, though not excepting in Circuit Court, and is an adverse party within Section 550, L. O. L., as amended by Laws of 1913, page 617, entitled to a notice of appeal. (In re Waters of Chewaucan River, 659.)

Accepting Benefits Under Decree Appealed from.
See Divorce, 1.

APPEARANCE.

Appearance—"General Appearance."

1. A "general appearance" must be express or implied from defendant's taking of some step in a cause beneficial to himself or detrimental to plaintiff other than one contesting the jurisdiction only, the purpose of which must bear some substantial relation to cause. (In re Waters of Chewaucan River, 659.)

ASSESSMENT.

Special Assessment.
See Constitutional Law, 7.

For Drainage Benefits and Enforcing Payment.
See Drains, 8, 10.

Creation of Assessment District.
See Municipal Corporations, 9.

Priority of Liens for Taxes and Special Assessments.
See Taxation, 1.

ASSIGNMENT.

See Patent, 1.

ASSUMPTION OF RISK.

See Master and Servant, 18.

ATTACHMENT.

Attachment—Bailee of Sheriff.

1. Where defendant, having executory contract to buy wheat from third person, accepted the wheat from the sheriff, who had attached it in such person's hands, and issued warehouse receipts to the sheriff it became the sheriff's bailee, and in a way attorned to him. (Davidhizer v. Elgin Forwarding Co., 89.)

ATTORNEY AND CLIENT.

Attorney and Client—Powers of Attorney—Satisfaction of Judgment.

1. Under Section 1083, L. O. L., authorizing attorney to discharge claim and acknowledge satisfaction of judgment, where client obtained judgment for return of property or for its value, his attorney had power to satisfy the judgment upon payment of the assessed value. (Davidhizer v. Elgin Forwarding Co., 89.)

See Fraud, 3, 4.

ATTORNEY'S FEES.

See Eminent Domain, 2.

AUTHORITY.

See Municipal Corporations, 21.
See Principal and Agent, 2.

BAILMENT.

Bailment—Lien for Work—Possession.

1. It was competent for the legislature, by enactment of Section 7497 et seq., L. O. L., as amended by Laws of 1911, page 213, as to liens upon chattels, to provide for a lien notwithstanding the claimants had not possession of the property, since the lien rests upon the doing of labor or furnishing material. (Hiner v. Pitts, 602.)

Bailment—Lien—Loss—Lapse of Time.

2. Claimant of lien on chattel *held* to have performed work in various months under a single contract, so as to be entitled to a lien for the entire amount of work done, notwithstanding the lapse between dates on which the work was done. (Hiner v. Pitts, 602.)

Bailment—Lien—Notice of Claim.

3. Where defendants, owning donkey-engine, desired its occasional repair during logging season, and authorized plaintiff to make the repairs on the job, so as to keep the engine running, plaintiff had a qualified possession, which was terminated by the mutual agreement to abrogate the contract, so that notice within 60 days after the abrogation of the contract was in time, under Section 7497 et seq., L. O. L., as amended by Laws of 1911, page 213. (Hiner v. Pitts, 602.)

BALLOT TITLE.

See Municipal Corporations, 1.

BANCROFT BONDING ACT.

Impairment of Contract Rights by Subsequent Legislation.

See Constitutional Law, 9.

BANKS AND BANKING.

Banks and Banking—Withdrawal of Deposit—Evidence.

1. Statement by a depositor in a bank that he had loaned his money to its president is competent evidence for the bank that he had withdrawn his money from the bank. (Haines v. First Nat. Bank of Roseburg, 42.)

Banks and Banking—Liability of Bank—Acts of President as Individual.

2. The president of a bank may as an individual borrow money for his private account from a depositor in the bank; dealing with one who is president of a bank not necessarily making his acts those of the bank. (Haines v. First Nat. Bank of Roseburg, 42.)

BAR.

See Judgment, 1.

Bar of Action Against Principal as Affecting Surety.

See Limitation of Actions, 3.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.

Bills and Notes—Accommodation Maker—Liability—Statute.

1. Under Section 5862, L. O. L., one who signed a firm note as maker without receiving value therefor, to lend his name to the firm, is liable on the instrument to a bank holding for value, though the bank, when it took the note, knew he was only an accommodation party. (Farmers' State Bank of North Powder v. Forsstrom, 97.)

Bills and Notes—Accommodation Party—Liability.

2. One who had signed a firm's note as maker, without receiving value and merely for accommodation, under Section 6023, L. O. L.,

is primarily liable on the note, and absolutely required to pay. (Farmers' State Bank of North Powder v. Forsstrom, 97.)

Bills and Notes — Accommodation Party — Liability to Payee or Holder.

3. One who sign's a firm's note for accommodation, whatever his position on the instrument as between himself and the firm, as to the payee or holder he does not stand as an indorser or one secondarily liable and is not entitled so to be treated. (Farmers' State Bank of North Powder v. Forsstrom, 97.)

Bills and Notes—Accommodation Maker—Statement by Payee.

4. Statement by the payee of a note, to one who signed as maker for accommodation only, that he would be safe in signing the note did not change the legal effect of the transaction, which rendered him primarily liable to pay. (Farmers' State Bank of North Powder v. Forsstrom, 97.)

Bills and Notes — Accommodation Maker — Extension of Time — Statute.

5. An accommodation maker, under the Negotiable Instrument Act, Section 5834, L. O. L., et seq., is not relieved from payment of the note by the extension of the time of the payment thereof for a valuable consideration therefor without his consent, though the holder knows him to be only an accommodation maker, as he is primarily liable. (Farmers' State Bank of North Powder v. Forsstrom, 97.)

Bills and Notes—Accommodation Maker—Duty to Pay.

6. When a note became due, it was the duty of an accommodation maker, to protect his interests, to pay the note, and then look to his comakers for reimbursement. (Farmers' State Bank of North Powder v. Forsstrom, 97.)

Bills and Notes—Accommodation Maker—Postponement of Right to Collect.

7. The accommodation maker of a note cannot complain of the postponement of the payee's right to enforce collection of the instrument made without such maker's assent. (Farmers' State Bank of North Powder v. Forsstrom, 97.)

Bills and Notes—Accommodation Maker—Duty.

8. If one of the firm which executed a note with an accommodation maker when it was due arranged with the payee to liquidate the indebtedness on the next day, it was incumbent on the accommodation maker, to free himself from liability, to see that the payment was made. (Farmers' State Bank of North Powder v. Forsstrom, 97.)

Bills and Notes — Accommodation Maker — Notice of Dishonor — Statute.

9. An accommodation maker of a note is not entitled to notice of dishonor under Negotiable Instrument Act, Section 5834 et seq., L. O. L. (Farmers' State Bank of North Powder v. Forsstrom, 97.)

Bills and Notes—Accommodation Maker—Discharge—Statute.

10. An accommodation maker of a note, being primarily liable, by Section 5952, L. O. L., can claim discharge by an act which will

discharge a simple contract for the payment of the money. (Farmers' State Bank of North Powder v. Forsstrom, 97.)

BOUNDARIES.

Boundaries—Maps—Surveys.

1. If a map or plat does not agree with survey of the same as laid upon the ground at time of making map or plat, the survey must prevail in establishing the correct boundary of a lot or street, if position of points and lines established by survey can be proved. (Bernitt v. City of Marshfield, 556.)

Boundaries—Evidence—Fences—Street Improvements.

2. In construing, interpreting, or resurveying an old map or plat, old fences, street improvements, lines of occupancy, etc., showing that the territory had for a long time been occupied under an evident and consistent survey of such plat, are strong evidence of location of original lines. (Bernitt v. City of Marshfield, 556.)

Boundaries—Plat Copied from Another Plat—Survey.

3. When a plat is copied from another map, it is proper to consult the latter, and the survey made thereunder, to locate the boundaries. (Bernitt v. City of Marshfield, 556.)

BROKERS.

Brokers—Right to Commission—Sale of Property—Contract.

1. In an action by a broker for his commission for sale of patent rights for which application was pending in Great Britain, the broker could not recover commission on proof of securing purchasers not willing to buy assignments of mere application rights, but insisting that they all first go to patent. (Hume v. Mears, 519.)

BUDGET LAW.

See Statutes, 14.

BURDEN OF PROOF.

See Deeds, 2, 8.
See Master and Servant, 1, 3, 4.
See Principal and Agent, 10.
See Reformation of Instruments, 1.

CANCELLATION OF INSTRUMENTS.

Cancellation of Instruments—Demurrer—Equitable Jurisdiction.

1. Where it appears inferentially that defendant was holding land as a guardian when she fraudulently prevailed upon plaintiffs to sell to her at an inadequate price, a complaint was not demurrable as not calling for equitable jurisdiction, although the court might not be able to grant the specific relief prayed for. (Marshall v. Gustin, 53.)

CARRIERS.

Carriers—Public Service Commission—Change of Rates—Proceedings.

1. The fact that proceedings of the Public Service Commission of Oregon increasing the rate of fare charged by a street railway were

not instituted by the state does not affect validity thereof; the commission being allowed by Section 45 of the act creating it (Laws 1911, p. 483) to act on its own motion, by Section 46 on petition of the public utility itself, and by Section 41 on complaint of any three persons, firms, corporations or associations, or any mercantile, agricultural or manufacturing society, or any political organization. (Portland v. Public Service Com., 325.)

Carriers—Regulation of Rates—Police Power.

2. Regulation of rates of the fares of a street railway is within the police power of the state. (Portland v. Public Service Com., 325.)

Carriers—Regulating Rates—Cities—Public Service Commission.

3. City's authority to represent the state in regard to the fares of a street railway, which had been given a franchise, was annulled by act creating Public Service Commission, and such authority given to such commission, who as state's agent could agree to change in the franchise allowing company an increased rate of fare. (Portland v. Public Service Com., 325.)

Carriers—Statutory Regulation—Creation of Public Service Commission—Retroactive Effect.

4. Order of Public Service Commission is not void, because the fare changed was agreed on by a franchise entered into prior to the enactment of the law creating the commission; the law being designed to deal with conditions as they arise. (Portland v. Public Service Com., 325.)

See Constitutional Law, 5.

CASES IN THE OREGON REPORTS.

Applied, Approved, Cited, Distinguished, Followed and Overruled in This Volume.

See Table in Front of this Volume.

CHARITABLE INSTITUTIONS.

See Charities, 1, 2.

CHARITIES.

Charities—Charitable Institutions—Torts—Liability of Officers.

1. An action may be maintained against an officer of a charitable institution to recover damages for an injury caused by the negligence of such person, but the action must be against him in his individual and not in his corporate capacity, so that if a recovery is awarded it will not be discharged from the trust funds. (O'Neill v. Odd Fellows Home, 382.)

Charities—Liability—Torts.

2. Odd Fellows Home of Oregon, organized under Section 6796, L. O. L., providing that no such corporation shall ever use any of its resources for any other than charitable objects, cannot be held liable for injuries to a laundress working at the institution. (O'Neill v. Odd Fellows Home, 382.)

CHARTERS OF CITIES.

Cited and Construed in this Volume.

EUGENE.

See Studley v. Luse, 338.

GASTON.

See Gaston, Town of, v. Thompson, 412.

LA GRANDE.

See Wagoner v. City of La Grande, 192.

MARSHFIELD.

See Bernitt v. City of Marshfield, 556.

PORTLAND.

See Dryden v. Daly, 218.
See Christenson v. Portland, 609.
See Colby v. City of Portland, 566.
See Portland v. Public Service Commission, 325.

CHATTEL MORTGAGES.

Chattel Mortgages—Description—Sufficiency.

1. A chattel mortgage, describing the property as "forty head of milk cows, two horses and harness, and lease of fifty acres executed between parties named, now in the mortgagor's possession on the W. farm," is sufficient to enable third parties to identify the property by inquiry. (Elwert v. Hansen, 399.)

Chattel Mortgages—Record—Constructive Notice.

2. The record of a chattel mortgage, which is sufficient to enable third parties to identify the property by inquiry, constitutes constructive notice to subsequent claimants. (Elwert v. Hansen, 399.)

See Equity, 2.

CHILDREN.

Custody and Maintenance.

See Divorce, 2.

CITIES.

See Municipal Corporations.

CITY CHARTERS.

See Charters of Cities.

CITY ORDINANCES.

See Evidence, 11.

Violation of City Ordinance.

See Injunction, 2.

CLEARING AND IMPROVING LAND.

See Agriculture, 2–6.

Time for Performance of Services.

See Landlord and Tenant, 2.

COLLISION.

Collision—Remedy—Action at Law.

1. Section 5203, L. O. L., declaring liable in treble damages, which shall be a lien on the boat, a person in control of a boat, and likewise his employer, which is intentionally or negligently navigated so as to injure property of another, allows actions at law *in personam* against operator or owner employer; enforcement of lien not being sought. (Horst v. Columbia Contract Co., 344.)

Collision—Navigation and Fishing—Respective Rights.

2. While the right of navigation may be exercised on any part of a stream susceptible of navigation and is paramount to that of fishing, it cannot be exercised without liability for negligent and unnecessary injury to a fishing boat and its net. (Horst v. Columbia Contract Co., 344.)

Collision—Action—Instructions—Navigation and Fishing.

3. Requested instruction that a boat navigating a stream need not stop or go out of her way or wait on the movements of those managing a net is objectionable as open to construction that she might proceed on her course without regard for rights of fishermen, though not necessary. (Horst v. Columbia Contract Co., 344.)

COMMISSION.

Right to Commission.

See Brokers, 1.

COMMITMENT.

See Habeas Corpus, 3.

COMMON LAW.

See Eminent Domain, 3.
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Common-law Right to Change Name.

See Names, 1.

CONCLUSION.

See Pleading, 3, 4.

CONCLUSIVENESS.

Determination of Benefits Derived from Drainage District.

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Sale of Real Property for Inadequate Consideration.

See Execution, 3.

CONSPIRACY.

See Criminal Law, 3, 4.
See Homicide, 2.

CONSTITUTIONAL LAW.

Constitutional Law — Legislative Acts — Determination of Council Fixing Improvement District—Review.

1. The determination of the city council, fixing the district to which the expense of a street improvement should be chargeable, was a legislative act which the Supreme Court cannot review in suit to enjoin the enforcement of municipal liens. (Wagoner v. City of La Grande, 192.)

Constitutional Law—Self-executing Provisions—Initiative and Referendum—Power of People of County.

2. In the absence of an enabling act, the people of a county, as distinguished from the people of a city or town, cannot initiate and enact a local law; Article IV, Section 1, of the Constitution, providing that the initiative and referendum powers reserved to the people are further reserved to the voters of every municipality and district, as to local, special and municipal legislation therefor, not being self-executing, as is Article IV, Section 1, making the reservation to the people of the State, and being required to be construed with Article XI, Section 2, giving power to cities and towns, as distinguished from other municipalities, to make and amend their charters. (Carriker v. Lake County, 240.)

Constitutional Law—Police Power.

3. Police power is not restricted to public peace, health and safety, but covers the general welfare of the people; Article I, Section 1, of the Constitution, stating that governments are instituted for the peace, safety, and happiness of people. (Portland v. Public Service Com., 325.)

Constitutional Law — Impairing Right to Contract — Franchise—Carrier's Charges.

4. Order of Public Service Commission, changing rate of fare provided for by franchise granted street railway by city, is not void for impairment of contract rights, as the state, having granted franchise through the city as its agent, has right to change the provisions thereof through its representative, the Public Service Commission. (Portland v. Public Service Com., 325.)

Constitutional Law — Due Process of Law — Changing Carrier's Charges.

5. Public Service Commission's order changing the rate of fare provided for in street railway franchise granted is not void, because of depriving the city and its inhabitants of property and rights without due process of law, as the state, having granted franchise through city as its agent, has right to modify franchise by changing the rate of fare through its representative, the Public Service Commission. (Portland v. Public Service Com., 325.)

Constitutional Law—Police Power of State.

6. The use of all property is subject to the general police power of the state, to be exercised either directly or through subordinate

agencies to whom the state may intrust the exercise of that prerogative. (Gaston, Town of, v. Thompson, 412.)

Constitutional Law—Due Process—Special Assessment—Notice.

7. Though special assessment cannot be imposed upon property unless notice be given and owner afforded opportunity to be heard at some stage of the proceedings, personal notice is not required, and notice by publication or by posting is sufficient. (Drainage Dist. No. 7 v. Bernards, 531.)

Constitutional Law—Drains—Delegation of Legislative Power to Judiciary.

8. Section 6136, L. O. L., as amended by Laws of 1911, page 424, giving court right to prescribe notice to be given land owners in drainage district of assessment for drainage benefits, *held* not a delegation of legislative power to the judiciary. (Drainage Dist. No. 7 v. Bernards, 531.)

Constitutional Law—Bancroft Bonding Act—Contract Rights.

9. Where owners of land assessed for drainage benefits sign applications for right to pay in annual installments under Bancroft Bonding Act, they enter into contract which cannot be impaired by subsequent legislation. (Drainage Dist. No. 7 v. Bernards, 531.)

Constitutional Law—Surveys—Vested Property Rights.

10. Where property is surveyed and platted, property rights vesting under such plat cannot be changed by a subsequent survey ordered by city. (Bernitt v. City of Marshfield, 556.)

See Indictment and Information, 1.

CONSTITUTION OF OREGON.

Cited and Construed in this Volume.

See Table in Front of this Volume.

CONSTRUCTION.

See Agriculture, 1–3.
See Contracts, 4.
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See Evidence, 7.
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Construction of Workmen's Compensation Act.

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CONSTRUCTIVE NOTICE.

See Chattel Mortgages, 2.

CONTRACTOR.

See Mechanics' Liens, 4, 6.

CONTRACTS.

Contracts—Construction—Duty of Court.

1. Under Section 136, L. O. L., providing that the court shall determine the construction of statutes and other writings, the court must construe the written contracts made the basis of plaintiff's complaint. (Hume v. Mears, 519.)

Contracts—Contract to Pay Another's Debt—Consideration.

2. An agreement whereby one partner took over all of the other's interest in the partnership property, agreeing to pay the other's personal debts, to which the plaintiff creditor assented, was valid; the inducement being sufficient to uphold it. (Davidson v. Madden, 209.)

Contracts—Nonsuit—Variance—Consideration.

3. That a complaint charged that in consideration of plaintiff's forbearance to foreclose his mortgage on defendant's partner's partnership interest defendant agreed to pay the amount of a certain note secured by chattel mortgage, and plaintiff testified he did not agree to postpone foreclosure, did not render denial of nonsuit erroneous, where judgment for plaintiff could rest on other considerations. (Davidson v. Madden, 209.)

Contracts—Rights of Action—Contract for Benefit of Third Persons.

4. Where a person as full or part consideration for an executed contract, promises another to assume, pay or discharge some legal debt due from such other to a third person, the latter, though a stranger to the consideration and not an immediate party to the contract, may maintain an action thereon if the agreement was made directly or primarily for his benefit. (Davidson v. Madden, 209.)

See Appeal and Error, 8, 10.
See Attachment, 1.
See Brokers, 1.
See Constitutional Law, 4, 9.
See Evidence, 7.
See Frauds, Statute of, 2, 3.
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See Specific Performance, 5, 7.
See Vendor and Purchaser, 1–5.
See Work and Labor, 1–3.

Contract to Devise Realty.

See Wills, 1.

CORPORATIONS.

Corporations—Conveyance by Corporation—Estoppel of Officer.

1. A stockholder and officer, present at the meeting authorizing a transfer of the corporation plant, and later a party to the deed of transfer, and who becomes a stockholder in a corporation organized

to carry on the business, and who fails to question the transaction for seven years, is equitably estopped from impeaching the sale. (Aiken v. Bates, 260.)

Corporations—Public Service—Regulation of Rates.

2. It is primarily the duty of the State, in the interests of the public, to see that all concerns that serve the public be content with and are entitled to receive reasonable compensation for their services. (Portland v. Public Service Com., 325.)

Transfer of Interest in Corporation.

See Trusts, 2.

COSTS.

Costs—Voluntary Nonsuit.

1. Where the statute does not specify what costs shall be paid upon voluntary nonsuit, the usual costs provided by statute will be taxed. (Warm Springs Irr. Dist. v. Pacific Livestock Co., 19.)

Costs—Discretion of Court.

2. Under Article VII, Section 3, of the Constitution, as amended in 1911 (see Laws 1911, p. 7), authorizing modification of judgment on appeal, the court on appeal has the power to award costs on equitable principles, and to give or deny costs to either party on appeal. (Stabler v. Melvin, 226.)

Costs—Services of Interpreter.

3. Section 855, L. O. L., requires intervention of interpreter in case where witness does not understand English language. An item in judgment for services of interpreter under such circumstances was proper as a necessary disbursement. (Franconi v. Graham, 619.)

See Eminent Domain, 3, 5.

COUNTERCLAIM.

See Landlord and Tenant, 8.

COUNTER EVIDENCE.

See Evidence, 4, 5.

COUNTY ROADS.

See Highways.
See Municipal Corporations, 17–21.

COURTS.

Courts—Opinions—Requisites and Sufficiency—"Concise Statement."

1. Under Article VII, Section 4, of the Constitution, providing that at the close of each term the judges shall file concise written statements of their decisions, the term "concise statement" means the conclusion, rather than the reasoning, and the court need not separately discuss each and every assignment of error. (Schmid v. Thorsen, 575.)

Courts—Jurisdiction of Supreme Court.

2. Aside from *mandamus, quo warranto* and *habeas corpus* proceedings, the Supreme Court is one of limited jurisdiction, and cannot

acquire authority to act in any cause, except in the manner provided by statute. (McCarger v. Moore, 597.)

COVENANTS.

See Landlord and Tenant, 1.

CRIMINAL LAW.

Criminal Law—Indeterminate Sentence—Construction of Statute.

1. Laws of 1917, Chapter 302, Section 17, providing that Laws of 1911, Chapter 127, Sections 6–8, 14–17, dealing with the giving of indeterminate sentences and amended by the act of 1917, shall remain in effect in certain specified cases, *held* to preserve the operation of original sections as to crime committed before act of 1917 went into effect. (State v. Chong Ben, 313.)

Criminal Law—Repeal of Statute by Implication.

2. The repeal of statutes by implication is not favored. (State v. Chong Ben, 313.)

Criminal Law—Conspiracy—Instruction—Province of Jury.

3. An instruction that, where two or more persons are associated together for purpose of doing an unlawful act, the act of one is deemed act of all is not objectionable, as invading province of jury by assuming existence of conspiracy. (State v. Chong Ben, 313.)

Criminal Law—Instructions—Acts and Declarations of Conspirators.

4. An instruction that, where two or more persons are associated together for purpose of doing an unlawful act, the act or declaration of one while engaged in or pursuant to the common object or design is the act or declaration of all, for which all are liable, does not permit jury to use acts and declarations of one against all defendants regardless of proof of conspiracy or whether proof of conspiracy existed at the time of the act or declaration and does not permit proof of conspiracy as to all by evidence of acts and declarations of one. (State v. Chong Ben, 313.)

Criminal Law—Further Instruction—Necessity for Request.

5. Where no request was made, court may assume that instruction further than that given was not desired, where instruction, although proper, could have been deduced from a given instruction. (State v. Chong Ben, 313.)

Criminal Law—Accusations Before Magistrate.

6. It is not necessary that an accusation before a magistrate be reduced to writing. (Ex parte Jack Wessens, 587.)

Criminal Law—Accusations Before Magistrate.

7. A magistrate may hold a defendant to answer for whatever crime the evidence taken before him disclosed, whether it be an offense named in the written or oral charge or not. (Ex parte Jack Wessens, 587.)

CRUELTY.

See Divorce, 3.

CUSTODY AND MAINTENANCE.

See Divorce, 2.

DAMAGES.

Damages—Reduction of Loss.

1. The duty of a party injured by the trespass of another is to exercise the diligence of an ordinarily prudent man to minimize the damages. (Boyd v. Grove, 80.)

Damages—Elements—Embarrassment.

2. An injured servant cannot recover as an element of damages for any embarrassment that may result from his changed appearance due to the accident, such element of damages being too remote and indefinite. (Camenzind v. Freeland Furniture Co., 158.)

Damages—Deposits to Secure Lease—"Penalty."

3. Where lease provided for the deposit of $10,000 by the lessee with the lessor to be forfeited in case of nonpayment of rent or other fault of the lessee, such deposit constituted a "penalty" and not liquidated damages. (Moumal v. Parkhurst, 248.)

Damages—Breach of Warranty—Reduction of Damages.

4. In case of breach of warranty in a contract of sale, the buyer owes an active duty to exercise ordinary care to keep the damages as low as possible. (Feeney & Bremer Co. v. Stone, 360.)

See Animals, 1, 2.
See Highways, 4, 5.
See Sales, 15, 17, 19, 20, 22.

Presenting Claim for Damages.

See Municipal Corporations, 24.

DEATH.

See Master and Servant, 14–18.

DECREE.

Vacating Decree Appealed from, Effect.

See Appeal and Error, 1–3.

DEDICATION.

Dedication of Part of Street.

See Municipal Corporations, 22.

Attempted Dedication of Part of Street.

See Municipal Corporations, 23.

DEEDS.

Deeds—Understanding of Grantor—Sufficiency of Evidence.

1. In suit by a daughter to cancel her mother's deed to a son on the ground of undue influence, evidence *held* to show that the mother

understood the purport of her deed when she executed it, and that she realized thereafter that her son had title to the property. (Rowe v. Freeman, 428.)

Deeds—Trust Relationship—Burden of Proof.

2. If a fiduciary relation existed between mother and son, in suit by a daughter to cancel the mother's deed to the son the burden of proof devolved on the son to sustain the transaction. (Rowe v. Freeman, 428.)

Deeds—Trust Relationship—Evidence.

3. In a daughter's suit to cancel a deed executed by her mother to a son on the ground of undue influence and trust relationship, that the mother executed a power of attorney to the son was a circumstance to be given weight in determining whether a trust relation existed between them, but the circumstance does not, of itself, establish a fiduciary relation. (Rowe v. Freeman, 428.)

Deeds — Conveyance to Trustee — Independent Advice — Burden of Proof.

4. Where a mother constituted her son her attorney in fact by giving him power of attorney, but the only use he made of such power was the ministerial act of withdrawing a deed to the mother's land deposited in escrow, the power of attorney did not create such relation of trust between the mother and son that in a daughter's suit against him to cancel his mother's deed to him, executed after revocation of the power, he had the burden to prove his mother acted under independent advice. (Rowe v. Freeman, 428.)

Deeds—Conveyance to Trustee—Independent Advice—Termination of Relation.

5. If son's power of attorney from his mother created a relationship of trust between them, laying upon him the burden, in his sister's suit to cancel his mother's deed to him, to uphold the good faith of the transaction, the termination of the relation by revocation of the power of attorney destroyed the son's disqualification to deal with his mother unadvised. (Rowe v. Freeman, 428.)

Deeds—"Fiduciary Relation"—Absence of Trust or Agency.

6. Fiduciary relationship may exist in the absence of a trust or agency, being found, with its accompanying burdens and disqualifications, wherever there is confidence reposed on one side and resulting superiority and influence on the other. (Rowe v. Freeman, 428.)

Deeds—Fiduciary Relationship—Parent and Child.

7. The relation of parent and child, accompanied by the affection and companionship incident thereto, does not make the child a fiduciary within the rule casting the burden upon him to justify a deed in his favor from his parent. (Rowe v. Freeman, 428.)

Deeds—Undue Influence—Burden of Proof.

8. In a daughter's suit to cancel her mother's deed to a son, where the daughter failed to show the existence of a fiduciary relationship between mother and son, the burden of proof was on her to establish the undue influence and other matters relied on to set aside the deed. Rowe v. Freeman, 428.)

Deeds—Undue Influence—Execution on Request.

9. The execution of a deed at the suggestion or request of the grantee, the grantor, his mother, reserving a life estate and revenues adequate to her necessities, did not constitute undue influence nor vitiate the conveyance. (Rowe v. Freeman, 428.)

Deeds—Deed from Parent to Child—Presumption of Invalidity.

10. No presumption of invalidity attaches to a deed from mother to son wherein the mother reserves a life estate and revenues adequate to her necessities, though executed without monetary consideration at the suggestion or request of the son; the mother being mentally competent and no trust relation existing. (Rowe v. Freeman, 428.)

Deeds—Undue Influence—Fiduciary Relation—Termination.

11. On the issue of undue influence in procurement of deed from mother to son, a power of attorney from her to him, to enable him to obtain a paper put by her in escrow, and used only for that purpose, was without value as conclusive evidence of trust relation between them, where it was revoked before execution of deed. (Rowe v. Freeman, 428.)

Deeds—Fiduciary Relation—Independent Advice.

12. That the grantor has confidence in and trusts the grantee does not make independent advice a *sine qua non* to validity of deed of gift. (Rowe v. Freeman, 428.)

Deeds—Deed to Son—Presumption of Validity.

13. Presumptions, under Section 799, subdivisions 1, 19, L. O. L., of innocence of wrong and fairness and regularity of private transactions, *held* to require finding against undue influence in deed to son, with reservation of life estate, only confidence and opportunity appearing; other children being presumptively dead or near death, and testimony of fairness not being met. (Rowe v. Freeman, 428.)

Conveyance by Corporation.

See Corporations, 1.

Setting Aside Sheriff's Deed.

See Execution, 3.

False Recital in Deed.

See Forgery, 1.

Conveyance to Trustee.

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Setting Aside Default.

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See Habeas Corpus, 2.
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DEPOSIT AND BANK DEPOSITOR.

See Banks and Banking, 1, 2.
See Limitation of Actions, 1.

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Inadmissible When not Taken by Special Referee.

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DEPOSITS.

To Secure Payment of Rent.

See Damages, 3.
See Landlord and Tenant, 3.

DESCENT AND DISTRIBUTION.

Descent and Distribution—Liability of Heir for Ancestor's Debt.

1. In action for specific performance of agreement to convey bungalow, brought after promisor's death, plaintiffs cannot recover judgment for unpaid installments on bungalow against promisor's heir under Section 491, L. O. L., making heir liable for ancestor's debts to extent of real estate inherited, where it does not appear that personal assets of the estate were insufficient to pay such debt under Section 492. (Schlussel v. Hays, 463.)

DESCRIPTION.

Of Personal Property in Chattel Mortgage.

See Chattel Mortgages, 1.

DISCRETION OF CITY COUNCIL.

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DISMISSAL AND NONSUIT.

See Eminent Domain, 2.

What Costs are Taxed on Voluntary Nonsuit.

See Costs, 1.

DISMISSAL OF APPEAL.

See Appeal and Error, 22, 32, 37.

DIVORCE.

Divorce—Right to Appeal—Acceptance of Benefits Under Decree Appealed from.

1. In divorce proceedings, where decree was rendered for the husband, and the wife was allowed a monthly sum as alimony, she cannot, after accepting such allowance, appeal from the whole decree, the allowance of alimony being an integral part thereof. (Sherman v. Sherman, 130.)

Divorce—Custody and Maintenance—Modification of Decree.

2. The Supreme Court has jurisdiction, on appeal from denial of a motion to modify the decree as to custody and maintenance of children, to modify the decree. (McLennan v. McLennan, 425.)

Divorce—Sufficiency of Evidence—Cruelty.

3. In husband's action for divorce, where both parties charged the other with cruelty, evidence *held* to show husband and wife equally at fault and subject to like criticism. (Mosier v. Mosier, 477.)

Divorce—Parties Equally at Fault—Right to Divorce.

4. In divorce action, where evidence showed both parties equally at fault, neither was entitled to divorce. (Mosier v. Mosier, 477.)

DRAINAGE DISTRICTS.

See Drains, 1–10.
See Eminent Domain, 6.

Proceeding for Establishment.

See Appeal and Error, 5.

DRAINS.

Drains—Conclusiveness of Determination—Benefits.

1. Where court, upon land owner's objection to inclusion of his land in proposed drainage district, decided such land would be benefited by the ditch and subsequently upon objection to levy of assessment and to amount thereof made similar finding, owner cannot raise same question on district's action to foreclose the lien of assessment. (Drainage Dist. No. 7 v. Bernards, 531.)

Drains—Purpose of Drainage—Public Use—Health.

2. Drainage for benefit of the public health is for a public use. (Drainage Dist. No. 7 v. Bernards, 531.)

Drains—Purpose—Public Benefit—Agriculture—Swamp-land.

3. The reclamation of large tracts of swampy lands for agricultural purposes is generally considered to be for the public benefit. (Drainage Dist. No. 7 v. Bernards, 531.)

Drains—Drainage District—Statute—Petition.

4. Section 6126, L. O. L., as amended by Laws of 1911, page 424, providing for organization of drainage district for public benefit and

requiring petition to state "necessity for such drainage," *held* to require petition to allege that district is to be for a public purpose, and hence not unconstitutional. (Drainage Dist. No. 7 v. Bernards, 531.)

Drains—Drainage District—Statute—Petition—Public Purposes.

5. A statute providing for organization of drainage districts is not necessarily unconstitutional because of failure to expressly require petition to allege the proposed district to be a public necessity. (Drainage Dist. No. 7 v. Bernards, 531.)

Drains—Drainage Districts—Statutes—Notice.

6. Section 6126, L. O. L., as amended by Laws of 1911, page 424, relating to formation of drainage districts and providing for published, posted and personal notice to owners of land within proposed district, is valid though provision as to personal service is too uncertain to be enforceable, provision as to notice by publication and posting being sufficient, though no provision as to notice would have been necessary to statute's validity. (Drainage Dist. No. 7 v. Bernards, 531.)

Drains—Drainage Districts—Organization—Notice.

7. A drainage district cannot be legally organized unless notice be given as prescribed by Section 6126, L. O. L., as amended by Laws of 1911, page 424. (Drainage Dist. No. 7 v. Bernards, 531.)

Drains—Drainage Districts—Assessment—Notice.

8. An assessment for drainage benefits is not valid unless notice is given as provided by Section 6136, L. O. L., as amended by Laws of 1911, page 424. (Drainage Dist. No. 7 v. Bernards, 531.)

Drains—Assessment—Action—Evidence—Notice.

9. In action to foreclose lien of assessment for drainage benefits where fact of service of notice of the organization of the district actually existed, it was competent in Circuit Court to supplement the proof of service submitted to the County Court, who had jurisdiction over organization of the district, with the parol testimony of deputy sheriff, who claims to have served notice. (Drainage Dist. No. 7 v. Bernards, 531.)

Drains—Statutes—Assessment—Enforcing Payment.

10. Laws of 1915, page 540, repealing by implication Sections 6126–6145, L. O. L., relating to drainage districts, does not prevent a district from enforcing payment of a delinquent assessment, where all assessment proceedings were completed before the act of 1915 became effective; the assessment under Section 6136, L. O. L., as amended by Laws of 1911, page 424, having become lien on land, and act of 1915, although without saving clause, operating prospectively and retrospectively. (Drainage Dist. No. 7 v. Bernards, 531.)

See Constitutional Law, 8.

DUE PROCESS OF LAW.

See Constitutional Law, 5, 7.

ELECTION OF REMEDIES.

Election of Remedies—Necessity of Pleading.

1. Prior election of inconsistent remedy by plaintiff being a bar, and therefore affirmative defense, to be available to defendants, it must be pleaded, and cannot be predicated on original complaint in evidence declaring for breach of contract, which plaintiffs amended to recover on *quantum meruit*. (Franconi v. Graham, 619.)

ELECTRICITY.

Electricity—Insulation.

1. Laws of 1911, Chapter 3, Section 1, providing that one controlling the transmission of electricity must insulate the wire at all points where the public are liable to come in contact with it, does not require insulation on a wire, properly attached to poles, at a point 30 feet from a pole. (Turnidge v. Thompson, 637.)

Electricity—Operation of Employers' Liability Act—"Public."

2. Employers' Liability Act, Section 1, providing that persons transmitting electricity shall insulate wires at points where public may come in contact with them, does not give a member of the public a right of action, unless he is an employee, or is engaged in a hazardous employment; the word "public" relating only to criminal liability under the act. (Turnidge v. Thompson, 637.)

EMINENT DOMAIN.

Eminent Domain—Right to Abandon Condemnation Proceedings.

1. An irrigation district, bringing proceedings to condemn private land for a dam and reservoir site, may abandon such proceedings any time prior to actually depositing money to be paid. (Warm Springs Irr. Dist. v. Pacific Livestock Co., 19.)

Eminent Domain Proceedings—Voluntary Nonsuit—Attorney's Fees—"Trial."

2. Section 6868, L. O. L., as amended by Laws of 1913, page 81, providing for payment of attorney's fees to defendant in eminent domain proceedings "to be fixed by the court at the 'trial,'" has reference to main trial of the cause, and to entitle defendant to no attorney's fees upon voluntary nonsuit. (Warm Springs Irr. Dist. v. Pacific Livestock Co., 19.)

Eminent Domain Proceedings—Costs—Common Law.

3. A party to eminent domain proceedings, having no right to recover costs at common law, is entitled thereto only as provided by statute. (Warm Springs Irr. Dist. v. Pacific Livestock Co., 19.)

Eminent Domain Proceedings—Pleading—Tender.

4. In eminent domain proceedings a complaint, alleging that plaintiff offered to pay defendant $25,000 for the land; that the offer was refused; that plaintiff is ready, willing and able to pay such sum for the land,—is sufficient allegation of tender and refusal. (Warm Springs Irr. Dist. v. Pacific Livestock Co., 19.)

Eminent Domain—Costs—Tender—Statutes.

5. Section 574, L. O. L., applying to actions generally and providing for costs to defendant in case of tender, before suit, of amount greater than judgment, does not apply to eminent domain proceedings; this being a special proceeding governed by Section 6868, which is exclusively applicable to eminent domain proceedings. (Warm Springs Irr. Dist. v. Pacific Livestock Co., 19.)

Eminent Domain—Public Uses—Drainage District.

6. Laws of 1889, page 25 (Section 6126, L. O. L.), as amended by Laws of 1911, page 424, providing for organization of drainage district upon petition of 25 per cent of owners desiring to drain land "for the public benefit for sanitary purposes," and Section 6128, L. O. L., as amended by Laws of 1911, page 424, requiring court to find that "district is of public utility and importance," provide for drainage for public uses and do not authorize taking of private property for private purposes. (Drainage Dist. No. 7 v. Bernards, 531.)

EMPLOYERS' LIABILITY ACT.

See Electricity, 2.
See Master and Servant, 8–13.
See Negligence, 1.

EQUITABLE JURISDICTION.

See Cancellation of Instruments, 1.
See Guardian and Ward, 1.

EQUITY.

Equity—Depositions—Special Referee—Admissibility—Statute.

1. Under Section 837, L. O. L., providing that the testimony of resident witnesses under certain circumstances may be taken by deposition in an action at law or in a suit in equity, and Section 838, providing that if a witness is a nonresident or is not found in the state his testimony can only be taken in a suit in equity by a special referee who shall return the testimony taken to the court appointing him, and in view of Sections 1012, 165 and 166, defining a referee and a trial by a referee and relating to the filing of his report, the deposition of a nonresident witness taken in a suit in equity pursuant to a commission issued to a notary public in another state and returned to the court was inadmissible in a suit in equity, because not taken by a special referee. (Craig v. Crystal Realty Co., 25.)

Equity—Maxims—Mortgage in Advance of Acquisition.

2. Where chattels are mortgaged in advance of their acquisition, the court sitting in chancery will construe the mortgage as pledging the property the instant it subsequently comes into the mortgagor's ownership, on the ground that equity will consider that as done which ought to have been done. (Gile & Co. v. Lasselle, 107.)

See Injunction, 2.

ESTOPPEL.

See Corporations, 1.
See Municipal Corporations, 23.

EUGENE, CHARTER OF.
See Studley v. Luse, 338.

EVICTION.
See Landlord and Tenant, 6.

EVIDENCE.

Evidence—Letters and Circulars.

1. A depositor suing a bank for an alleged balance may not introduce a printed circular mailed to him, announcing defendant's consolidation with the D. bank, or letter on letter-head of the D. bank signed by its president, making such announcement and stating continuance in the business of defendant's former president; it not being shown that D.'s president was agent of or authorized to speak for defendant, or that the circular was mailed by its authority. (Haines v. First Nat. Bank of Roseburg, 42.)

Evidence—Opinion Evidence—Examination of Witness.

2. In action for trespass and permanent injury to land, while witness could not testify categorically as to *quantum* of damages, he could prove value before and after the trespass by testimony directly stating the difference in value. (Boyd v. Grove, 80.)

Evidence—Opinion Evidence—Weight.

3. In trespass for damages to grass, and permanent injury to land, instruction that jury was not bound by opinion of witnesses as to *quantum* of damage, but that the same could be considered with other evidence, was proper. (Boyd v. Grove, 80.)

Evidence—Improper Evidence—Counter Evidence.

4. In trespass, while defendant's testimony as to their attempt to compromise should not have been admitted, plaintiff was, after its admission, entitled to give his version of the conversation. (Boyd v. Grove, 80.)

Evidence—Improper Evidence—Counter Evidence.

5. In action for trespass, where one defendant improperly detailed his version of conversation, offering compromise, which plaintiff disputed, adding a statement attributed to another defendant, proof that such other made no such statement was properly excluded. (Boyd v. Grove, 80.)

Evidence—Parol Evidence Affecting Writing—Conditional Signature of Note.

6. In an action on a note against one who signed for accommodation only, there being no fraud charged in its execution, it is not competent for the accommodation maker to allege or prove a contemporaneous parol agreement that under certain conditions he should not be called upon to pay, thereby varying and altering the legal effect of the instrument. (Farmers' State Bank of North Powder v. Forstrom, 97.)

Evidence—Opinion of Witness—Construction of Contract—Province of Court.

7. In view of Section 136, L. O. L., providing that all questions of law and the construction of statutes and other writings are to

be decided by the court, and Section 717, providing that for the proper construction of an instrument the circumstances under which it was made, etc., may be shown, so that the judge may be placed in the position of those whose language he is to interpret, permitting a party to a written contract to state what he understood by term "time is of the essence of the contract," and to state whether according to his understanding title passed until certain things were done, was error. (Gile & Co. v. Lasselle, 107.)

Evidence—Judicial Knowledge—Fruit Season.

8. The Supreme Court, by putting itself in the position of the parties on June 27, 1916, when contract was made, as it is required to do by Section 717, L. O. L., knows by the laws of nature and the fruit season that no present crop of prunes of the season of 1916 was dried and ready for shipment on June 27th. (Gile & Co. v. Lasselle, 107.)

Evidence—Presumption as to Laws of Sister State—Common Law.

9. In the absence of evidence, it must be assumed that the common-law right of a person to change her name obtains in a sister state. (State v. Ford, 121.)

Evidence—Presumptions—Official Duty.

10. In establishing a county road, a preliminary survey being required by statute will be presumed to have been made under the presumption that official duty has been regularly performed. (Arstill v. Hare, 128.)

Evidence—Judicial Notice—Municipal Ordinance.

11. The Supreme Court cannot take judicial knowledge of the existence of a city ordinance requiring contracts for street improvements to be let to the lowest bidder. (Wagoner v. City of La Grande, 192.)

Evidence—Parol—Plat—Ambiguity.

12. Parol evidence, though inadmissible to change a plat of a city or town made by the owner of the property, in a collateral suit, is competent, under Section 713, L. O. L., to explain an ambiguity in the plat. (Bernitt v. City of Marshfield, 556.)

Evidence—Parol—Plat—Survey.

13. Parol evidence is competent to show survey of lines delineated on a map by dotted red lines. (Bernitt v. City of Marshfield, 556.)

Evidence—Parol—Survey.

14. Evidence of where a survey actually ran is always competent, for purpose of showing lines and boundaries. (Bernitt v. City of Marshfield, 556.)

See Animals, 2.
See Appeal and Error, 12, 14, 17, 24, 26.
See Boundaries, 2.
See Deeds, 1, 3.
See Divorce, 3.
See Drains, 9.
See Fraud, 1, 4.
See Homicide, 1, 3.
See Landlord and Tenant, 7.
See Master and Servant, 5, 15.
See Mechanics' Liens, 4, 6.

See Principal and Agent, 11.
See Specific Performance, 4.
See Statute of Frauds, 2, 3.
See Trial, 1, 4, 7, 10.
See Trusts, 2.

EXCEPTIONS, BILL OF.

Exceptions, Bill of—Form—Alternative.

1. Under Section 171, L. O. L., as amended by Laws of 1913, page 650, so as to re-enact the old section as to the form of a bill of exceptions, with added proviso that it may consist of a transcript of the testimony, etc., it is optional with the trial court to settle it in the old form or certify it in the form of the proviso. (Horst v. Columbia Contract Co., 344.)

Exceptions, Bill of, Review.

2. A bill of exceptions to rulings made in settling the original bill will not be considered. (Schmid v. Thorsen, 575.)

EXECUTION.

Execution—Sale of Realty and Personalty.

1. Since a judgment debtor may under Sections 240, 244, L. O. L., redeem realty sold on execution, but cannot redeem personalty, and since under Sections 5132, 5136, placer mining claims and ditches are realty, it was error to confirm sale on execution of such claims and pipe-lines and tools thereon in one unsegregated bid and for a lump sum, part of which were personalty, because the amount to be paid in redemption could not be ascertained. (Roseburg Nat. Bank v. Camp, 67.)

Execution—Sale of Realty and Personalty.

2. In view of Section 238, L. O. L., requiring execution sales of realty to be at the courthouse door, and those of personalty in view of the purchasers, and in view of the different provisions for notice of such sale, as applying to realty and personalty, the statutes do not contemplate an execution sale of realty and personalty *en masse*. (Roseburg Nat. Bank v. Camp, 67.)

Execution—Interest of Heirs.

3. The share of an heir in real property is subject to execution upon a judgment against the heir, even prior to final distribution of the estate. (Malagamba v. McLean, 307.)

Execution—Sales for Inadequate Consideration—Setting Aside Sheriff's Deed.

4. In suit to set aside sheriff's deed issued to purchaser at execution sale and permit judgment debtors to redeem, facts *held* to justify decree for plaintiffs, there having been no serious attempt to levy upon personalty before resorting to land which, though worth $4,000, was sold for $262.75. (Shepperd v. Holmes, 626.)

See Appeal and Error, 11.
See Mortgages, 2.

EXECUTORS AND ADMINISTRATORS.

Executors and Administrators—Interest in Realty.

1. In the absence of a showing that there is some necessity for his interference, for some purpose of administration recognized by

statute, an administrator has nothing to do with the real estate, and it is the absolute property of the heir. (Malagamba v. McLean, 307.)

EXECUTORY CONTRACT.

See Sales, 7–9.

FENCES.

See Boundaries, 2.
See Railroads, 1, 2.

FIDUCIARY RELATION.

See Deeds, 1–13.

FINDINGS.

See Appeal and Error, 16, 21.

FISHING.

Respective Rights of Fishing and Navigation.

See Collision, 2, 3.

FIXTURES.

Fixtures—Mode of Annexation.

1. Annexation of personalty to realty is not the sole test whether the fixture is removable, though it is an essential element, and if a chattel is so annexed as to be incapable of severance, it is usually conclusively part of the realty. (Roseburg Nat. Bank v. Camp, 67.)

Fixtures—Mode of Annexation—Pipe-lines.

2. Pipe-lines for placer mining, attached to water bulkhead and laid over surface of ground, and giants attached to end of the pipe-line, while taken apart and moved each year, are sufficiently attached to the realty to imply annexation. (Roseburg Nat. Bank v. Camp, 67.)

Fixtures—Adaptation and Use.

3. The element of adaptation to the land and its use is entitled to great weight, in connection with intention, in determining whether fixtures are attached to and part of the realty. (Roseburg Nat. Bank v. Camp, 67.)

Fixtures—Intent in Making Annexation.

4. In determining whether fixtures are attached to and part of the realty the intention of the party is the most important element, and may be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose and use for which the annexation has been made. (Roseburg Nat. Bank v. Camp, 67.)

Fixtures—Relation of Parties.

5. In determining whether fixtures are attached to and part of the realty, the relation and situation of the party making the annexation is an important factor, and must be taken into consideration. (Roseburg Nat. Bank v. Camp, 67.)

Fixtures—Between Mortgagor and Mortgagee.

6. Rules for determining whether fixtures are attached to and part of the realty, which apply between grantor and grantee, also

apply between mortgagor and mortgagee. (Roseburg Nat. Bank v. Camp, 67.)

Fixtures—Intent—"Permanent."

7. If the annexation is not intended to be permanent, an article of personal property will not be deemed realty; and for the purpose of discovering whether the annexation was intended to be permanent the degree and mode of annexation may be considered, and also whether the annexation is to make the chattel or the land more useful, but "permanent" does not mean "perpetual," but only continuance until the usefulness of the land or the article passes. (Roseburg Nat. Bank v. Camp, 67.)

Fixtures—Mortgagor and Mortgagee—Pipe-line.

8. Pipe-lines for placer mining, attached to water bulkhead and laid over surface of ground, and giants attached to end of the pipeline, while taken apart and moved each year, and connected by slip joints, which the mortgagor did not intend to make permanent accessions to his mining claim, were not part of the realty. (Roseburg Nat. Bank v. Camp, 67.)

FORGERY.

Forgery—False Recital in Deed.

1. False recital in deed that E., who signed deed with defendant, was his wife, deed purporting to be deed of said parties, and being executed by E. under the name by which she was known, did not constitute forgery under Section 1996, L. O. L., providing that if any person shall with intent to injure or defraud, falsely make, alter, forge, or counterfeit any deed, or shall with such intent knowingly utter or publish as true or genuine any such false, altered, forged, or counterfeited writing, shall be punished, etc.; there being no intent to utter deed as that of others. (State v. Ford, 121.)

FRANCHISE.

See Constitutional Law, 4.
See Municipal Corporations, 15, 16.

FRAUD.

Fraud—Action—Evidence.

1. In an action to recover money paid to defendants for the exclusive right to sell patented automobile tires in the state on the ground that defendants had nothing to sell because the contract between the manufacturing company under whom defendants claimed and the owner of the patent right had been canceled, evidence *held* to show that such contract had not been canceled when plaintiff's contract with defendants was made. (Frederick v. Sherman, 187.)

Fraud—Fraudulent Concealment of Facts—Cause of Action.

2. In such case the fact that defendants knew that the manufacturing company would not be able to supply tires to plaintiff and fraudulently concealed such information from the plaintiffs, who had no knowledge thereof, did not constitute a cause of action to rescind the contract and to recover damages, in the absence of any fiduciary relation between the parties or any special state of facts wherein silence becomes in effect an active misrepresentation. (Frederick v. Sherman, 187.)

Fraud—Injury from Fraud.

3. Although defendant, an attorney, induced plaintiff, his client, to execute to him without consideration a note and mortgage on her land, which note and mortgage he sold, retaining the proceeds, plaintiff could not recover the amount of the note; the land having been purchased by one who agreed to pay, as part consideration therefor, the note and mortgage, and who had in fact acquired the note and mortgage, and plaintiff not having paid the note, and no demand therefor having been made on her, plaintiff might have a valid defense to any suit thereon. (Stabler v. Melvin, 226.)

Fraud—Evidence—Sufficiency.

4. Evidence *held* to show that note and mortgage in hands of *bona fide* purchaser were secured by defendant through fraud upon plaintiff, who was then his client, so as to warrant judgment for plaintiff against him for the amount of the note and mortgage. (Stabler v. Melvin, 226.)

See Municipal Corporations, 3, 6.

Fraud of Purchaser at Sale of Land.

See Infants, 1.

Discovery of Fraud.

See Limitation of Actions, 4.

FRAUDULENT CONVEYANCES.

Fraudulent Conveyances—Husband and Wife.

1. A creditor of the husband could not have a house and lot in the wife's name, the house having been built with the husband's money, subjected to his debt, in the absence of showing the husband's financial condition when he made the present of the house, or that it was done in fraud of existing creditors. (Malagamba v. McLean, 302.)

FREE EMPLOYMENT BUREAU.

See Municipal Corporations, 25–29.

GASTON, CHARTER OF.

See Gaston, Town of, v. Thompson, 412.

GUARDIAN AND WARD.

Guardian and Ward—Recovery of Property—Equity or Law—Inconsistent Remedies.

1. Where defendant was appointed guardian of plaintiffs and of personal property in Oregon, but not in Washington as to land there, and she purchased such land from them fraudulently at an inadequate price, equity had no jurisdiction of an action for the difference between the price received and the value of the land, it being necessary in such case that plaintiffs either affirm the transaction and sue for damages or repudiate the bargain and call upon equity to place them *in statu quo*, but both remedies cannot be had in one action. (Marshall v. Gustin, 53.)

HABEAS CORPUS.

Habeas Corpus—Pleading and Issues.

1. On *habeas corpus* the issue arises on the sufficiency of the return, which, under Section 648, L. O. L., may be controverted by demurrer or by reply. (Ex parte Jack Wessens, 587.)

Habeas Corpus—Demurrer to Return.

2. A statement in a return in *habeas corpus* that a proceeding resulting in commitment of the petitioner was carried on before a magistrate must be accepted as true on demurrer. (Ex parte Jack Wessens, 587.)

Habeas Corpus—Commitment.

3. Where the body of an instrument showed that it was a commitment by a circuit judge as committing magistrate, accused is not entitled to discharge on *habeas corpus* merely because the instrument is headed, "In the Circuit Court of the State of Oregon for the County of C." (Ex parte Jack Wessens, 587.)

HARMLESS ERROR.

See Appeal and Error, 4, 7, 8, 10, 13, 24.
See Highways, 3.

HIGHWAYS.

Highways—Establishment—Preliminary Survey—Presumption.

1. In proceedings to review action of County Court in establishing a county road, where there was no record of a preliminary survey, it will be presumed to have been made; there being no evidence to the contrary. (Arstill v. Hare, 128.)

Highways—Establishment—Scope of Review—Record.

2. The sufficiency of field-notes, plats and profiles will not be considered on proceedings to review the action of a County Court in establishing a county road; the record showing the filing of such field-notes, plats, and profiles. (Arstill v. Hare, 128.)

Highways—Establishment—Viewers—Appointment—Irregularities.

3. Where County Court in establishing county road reject the first report of the board of viewers, and, making a new order for viewing, reappoint the same viewers, the court's failure to make an order dismissing the viewers before reappointing them is a mere irregularity and harmless. (Arstill v. Hare, 128.)

Highways—Establishment—Viewers—Report—Damages.

4. Where the report of viewers appointed by County Court in the establishment of county road upon the question of damages follows the language of Section 6290, L. O. L., providing for the assessment of damages in the establishment of such roads, the County Court did not exceed its jurisdiction in its approval thereof. (Arstill v. Hare, 128.)

Highways—Establishment—Record—Damages—Viewers.

5. In proceedings to review action of County Court in establishing county road, where the record is silent on the methods adopted

by viewers in ascertaining damages, the court cannot pass on question of whether allowance was made for land taken. (Arstill v. Hare, 128.)

Highways—Encroachment—Mill-race.

6. From statutes requiring the owner to bridge mill-races where they cross a county road there may be inferred authority for passing laterally over such roads, but not for going along them longitudinally. (Gaston, Town of, v. Thompson, 412.)

Highways—"Nuisance Per Se"—Mill-race.

7. The admitted fact that a mill-race occupies a portion of a highway longitudinally makes it a nuisance *per se*, at common law, in the absence of any authority for its being there. (Gaston, Town of, v. Thompson, 412.)

HOMICIDE.

Homicide—Assault to Kill—Sufficiency of Evidence.

1. Evidence *held* to sustain conviction for assault with intent to kill. (State v. Chong Ben, 313.)

Homicide—Conspiracy—Question for Jury.

2. In a prosecution against three defendants for assault with intent to kill, evidence of conspiracy *held* sufficient to justify submission to jury of question of whether there was a conspiracy to kill. (State v. Chong Ben, 313.)

Homicide—Instructions—Evidence.

3. In a prosecution against three defendants for assault with intent to kill, where there was sufficient evidence to justify submission of conspiracy to jury, the giving of instructions as to conspiracy was not error. (State v. Chong Ben, 313.)

HUSBAND AND WIFE.

See Fraudulent Conveyances, 1.

IMPEACHMENT.

See Account Stated, 1.

IMPROPER EVIDENCE.

See Evidence, 4, 5.

INCONSISTENT REMEDIES.

See Guardian and Ward, 1.

INDEPENDENT ADVICE.

See Deeds, 4, 5, 12.
See Principal and Agent, 4.
See Trust, 3.

INDETERMINATE SENTENCE.

See Criminal Law, 1.

INDICTMENT.

Indictment and Information—Constitutional Provisions—Application.

1. Article VII, Section 5, of the Constitution, as amended by the initiative process in November, 1910, providing that no person shall be charged with crime in the Circuit Court except upon indictment found by grand jury, has no reference to such a complaint as may be made before a circuit judge, as a magistrate, with a view of holding the accused to answer at a subsequent term of the Circuit Court. (Ex parte Jack Wessens, 587.)

INFANTS.

Infants—Sale of Land—Fraud of Purchaser—Remedy.

1. Remedy of infants induced by fraud to sell their land for less than its value, they, on arriving at majority, choosing to affirm the sale, and not asking to have it set aside, is only at law for damages; there being nothing calling for an investigation that a jury cannot readily make. (Marshall v. Gustin, 53.)

INITIATIVE AND REFERENDUM.

See Constitutional Law, 2.
See Statutes, 4, 21.

INJUNCTION.

Injunction—Temporary Injunction—Motion.

1. In a suit to enjoin the sale of real estate and apply the equitable interest which plaintiff's judgment debtor has in the property, owned by his wife, in which a temporary injunction was granted on appeal, where a dissolution of the restraining order would enable the owner to dispose of the lot, and to determine on the restraining order whether the complaint states a cause of suit would be to decide the main question involved, a motion to dissolve the injunction on that ground will be denied. (Malagamba v. McLean, 302.)

Injunction—Existence of Other Remedy.

2. The creditor of an heir was not entitled to mandatory injunction, requiring application of the heir's share in the estate to his debt, in the absence of allegation that the sale of the share in the estate would not be ample to satisfy the execution on his judgment. (Malagamba v. McLean, 307.)

Injunction—Violation of Ordinance—Remedy at Law.

3. Defendant, maintaining a mill-race within corporate limits of town of Gaston, contrary to its police regulations, being a nonresident, so that the legal remedy provided by ordinances is insufficient to work out obedience, relief will be granted in equity. (Gaston, Town of, v. Thompson, 412.)

INSTRUCTIONS.

See Appeal and Error, 7, 9, 10, 18.
See Collision, 3.
See Criminal Law, 3–5.
See Homicide, 3.
See Trial, 1–3, 6, 7, 9, 10.

Refusal to Give Argumentative Instructions.

See Trial, 5.

INSULATION.

See Electricity, 1.

INSURANCE.

Insurance—Life Policy—Reinstatement—Application—Warranties.

1. Application for reinstatement of lapsed life policy, whereby insured warrants certain things, enters into and modifies the reinstated policy, though the application for insurance and original policy declared his statements representations and not warranties, in the absence of fraud. (Davidson v. Security Life Ins. Co., 405.)

INTENT.

See Fixtures, 4, 7.
See Statutes, 1.

INTERPRETER.

See Costs, 3.

JUDGMENT.

Judgment—Former Adjudication—Decision on Demurrer.

1. Where a complaint contains all essential allegations to the cause of action, but a demurrer is sustained thereto and a judgment of dismissal rendered, such judgment bars a subsequent suit for the same cause of action, wherein the complaint contains no substantial averment which is not found in the former complaint. (Wade v. Peters, 233.)

Judgment—Lis Pendens—Setting Aside Default—Effect.

2. Order under Section 59, L. O. L., setting aside default, restores the cause to the court's control, so that it becomes *lis pendens* with all its incidents. (Anderson v. Anderson, 654.)

Judgment—Vacating Orders—At Same Term.

3. At the term at which a court makes an order or determination though it be a final judgment or decree, it may modify or vacate it. (Anderson v. Anderson, 654.)

Judgment—Vacating Orders—After Term.

4. The court, making an order vacating a default and giving time extending into the next term to answer, has jurisdiction at next term after filing of answer to vacate the order. (Anderson v. Anderson, 654.)

Judgment—Opening Default—Setting Aside Order of Opening.

5. The court, being convinced that it had been imposed on in vacating a default and allowing defendant to answer, can set aside the order as improvidently made. (Anderson v. Anderson, 654.)

Judgment—Opening Default—Accompanying Answer.

6. Application for leave to answer after default must be accompanied by proposed answer. (Anderson v. Anderson, 654.)

Correction of Judgment.

See Appeal and Error, 23.

Satisfaction of Judgment by Attorney.

See Attorney and Client, 1.

New Action After Reversal of Judgment for Plaintiff.
See Limitation of Actions, 6.

Effect of Satisfaction of Judgment in Replevin.
See Replevin, 1, 2.

JUDICIAL KNOWLEDGE.
See Evidence, 8.

JUDICIAL NOTICE.
See Evidence, 11.

JURISDICTION.
Jurisdiction of Supreme Court.
See Appeal and Error, 33, 38.
See Courts, 2.

Equitable Jurisdiction.
See Cancellation of Instruments, 1.

Lack of Jurisdiction.
See Municipal Corporations, 4.

KNOWLEDGE.
See Evidence, 8.
See Principal and Agent, 3.

LACHES.
See Mandamus, 8.

LA GRANDE, CHARTER OF.
See Wagoner v. City of La Grande, 192.

LANDLORD AND TENANT.
Landlord and Tenant—Lease—Dependent Covenants.
1. A stipulation in a lease that lessee shall clear the land, and the further stipulation that lessor shall assist in the clearing by furnishing a man and team, are dependent covenants. (Holden v. Gulstrom, 133.)

Landlord and Tenant—Lease—Performance of Services.
2. Where part of the rental for the first year of a five-year lease was the tenant's agreement to do work in clearing land, such work, no time for performing it being specified in the lease, was due to be performed during the first year, and not within any reasonable time after the tenant assumed possession. (Holden v. Gulstrom, 133.)

Landlord and Tenant—Remedies of Tenant—Pleading Recovery of Deposit—"Evicted."
3. Where a lessee had deposited $10,000 with lessor for the payment of taxes and the rent for the final months of the term and to be forfeited in case of nonpayment of rent, a complaint, in a suit by

lessee to recover the deposit on the ground of eviction, stated a good cause of action as against demurrer on the ground that the deposit was a payment for a particular purpose and that there was no provision in the lease for its repayment; the word "evicted" meaning to be deprived of possession of lands or tenements, so as to terminate the tenancy. (Moumal v. Parkhurst, 248.)

Landlord and Tenant—Leases—Construction—"Deposit"—"Payment."

4. Under a lease whereby the lessee deposited $10,000 with the lessor to be held by the lessor and applied in payment on the rent for the final months of the tenure and for taxes, such amount to be the property of the lessor if the lease be forfeited or annulled on account of nonpayment of rent or otherwise, lessor to pay 6 per cent per annum until the deposit was taken over, the amount constituted a deposit the title to which remained in the lessee subject to the conditions of the lease and did not constitute an actual payment to the lessor at the time of the execution of the lease; "payment" meaning a transfer of money from one person who is the payer to another who is the payee, in satisfaction of a debt, and a "deposit" being made when one person gives to another, with his consent, the possession of personal property to keep for the use and benefit of the first or a third party. (Moumal v. Parkhurst, 248.)

Landlord and Tenant—Action for Rent—Failure to Give Possession.

5. In action for rent, the defense that the lessor failed to put defendants in possession was not sustained, where they occupied property for six years before discovering a slight encroachment upon it, and thereafter arranged with the lessor for erecting improvements. (Schmid v. Thorsen, 575.)

Landlord and Tenant—"Eviction"—Condemnation.

6. A city's condemnation of a part of leased premises does not constitute an "eviction," excusing nonpayment of rent. (Schmid v. Thorsen, 575.)

Landlord and Tenant—Rental Action—Sufficiency of Evidence.

7. In rental action, evidence that a city would remove its encroachment upon part of the property if the lessor would donate a much more valuable portion for street improvement purposes, which he refused to do, resulting in condemnation proceedings, *held* not to show that the lessor unreasonably delayed settling the controversy with the city. (Schmid v. Thorsen, 575.)

Landlord and Tenant—Rental Action—Counterclaim.

8. In a rental action, defendant lessee's counterclaim for street improvement damages, awarded to lessor in condemnation proceedings then pending upon appeal, was properly excluded. (Schmid v. Thorsen, 575.)

Landlord and Tenant—Delinquent Taxes—Lessee's Liability.

9. Where lease required the lessee to pay taxes, the lessor may recover delinquent taxes which were a lien upon the property, but which he had not in fact paid. (Schmid v. Thorsen, 575.)

Landlord and Tenant—Right to Rent.

10. A lessor cannot recover rent when by his own acts he has deprived the lessee of the beneficial use of the property. (Schmid v. Thorsen, 575.)

Landlord and Tenant—Right to Rent—Condemnation Proceedings.

11. A lessor is not bound to protect the lessee against condemnation proceedings, and, if part of the premises are taken thereunder, the tenant is nevertheless liable for the rent for the remainder not taken. (Schmid v. Thorsen, 575.)

LARCENY.

Larceny—Larceny by Bailee—Failure to Deliver Note—Statute.

1. Where defendant, husband of part owner of ranch sold, intrusted with note, payable to his wife and other owner, for delivery, after indorsement by payees, to agent who negotiated sale in payment of commission, at direction of his wife, she having indorsed, sold note and accounted to her for proceeds, he did not violate Section 1956, L. O. L., denouncing larceny by bailee. (State v. Andrews, 295.)

LEASE.

See Damages, 3.
See Landlord and Tenant, 1, 2, 4.
See Statute of Frauds, 1.

LEGISLATIVE POWER.

Delegation of Power to Judiciary.

See Constitutional Law, 8.

LIABILITY.

See Banks and Banking, 2.
See Bills and Notes, 1–3.
See Charities, 2.
See Landlord and Tenant, 9.

Liability of Officers.

See Charities, 2.

Liability of Heir for Ancestor's Debt.

See Descent and Distribution, 1.

Liability of Sheriff for Wrongful Levy.

See Limitation of Actions, 2.

LICENSE.

To Use Patented Material for Street Improvement.

See Municipal Corporations, 11.

LIENS.

See Agriculture, 1–6.
See Bailment, 1–3.
See Taxation, 1.

For Purchase Price Paid.

See Mortgages, 3, 4.
See Vendor and Purchaser, 5, 6.

LIFE POLICY.

See Insurance, 1.

LIMITATION OF ACTIONS.

Limitation of Actions—Action by Bank Depositor.

1. The statute of limitations does not begin to run against claim of a depositor in a bank till his demand has been refused. (Haines v. First Nat. Bank of Roseburg, 42.)

Limitations of Actions—Liability Created by Statute—Liability for Wrongful Levy—Statutes.

2. Under Sections 6, 7, L. O. L., providing that an action on a liability created by statute, other than a penalty or forfeiture, must be commenced within six years, and that an action against a sheriff, coroner or constable upon a liability incurred by the doing of an act in his official capacity, or by the omission of an official duty, including the nonpayment of money collected on execution, must be commenced within three years, where a sheriff, by virtue of an execution, levied on property of a stranger to the writ, rendering his surety liable to such stranger pursuant to Section 348, L. O. L., the latter was bound to bring her action against the sheriff and his surety within three years; the substance of the statute being that in general a statutory liability may be enforced within six years, but where the accountability of a sheriff, coroner or constable is involved, the action must be commenced within three years. (Barnes v. Massachusetts Bonding Co., 141.)

Limitation of Actions—Bar of Action Against Principal as Affecting Surety.

3. In relation to the matter of limitations, the sheriff's surety occupied no worse position than his principal, and the action against him was likewise barred in three years. (Barnes v. Massachusetts Bonding Co., 141.)

Limitation of Actions—Accrual—Discovery of Fraud.

4. Running of statute in action at law for fraud and deceit is not postponed to discovery of fraud, in view of Section 3, L. O. L., basing limitations in actions at law from accrual of cause of action with exceptions, but none as to fraud, and Section 391, making such exception in suit for fraud. (Hood v. Seachrest, 457.)

Limitation of Actions—Computing Time—Statutory Prohibitions.

5. Under Section 8, L. O. L., an action against a city for personal injuries caused by a defective sidewalk must be brought within two years after it accrued, and the provision of Section 20 that the period of a statutory prohibition shall be no part of the time limited is not made applicable in such a case by Portland City Charter, Section 282, providing for audit of claims, but not including claims arising *ex delicto*. (Colby v. City of Portland, 566.)

Limitation of Actions—New Action After Reversal of Judgment for Plaintiff.

6. Under Section 21, L. O. L., providing that, when an action begun within the statute of limitations results in judgment for plaintiff, the latter may bring a new suit thereon within one year after reversal

thereof on appeal, does not, in view of Section 184, apply to an action against a city and its officers, where plaintiffs' judgment against the officers was reversed more than a year after dismissal of the action against the city. (Colby v. City of Portland, 566.)

Limitation of Actions—Action Against Servant.

7. Running of statute of limitations is not interrupted by commencement of action against servant of real party in interest. (Colby v. City of Portland, 566.)

LIS PENDENS.

See Judgment, 2.

LOCAL LAWS.

See Statutes, 4.

MACHINERY.

Duty of Master to Guard Machinery.

See Master and Servant, 1–7, 12, 13.

MAGISTRATE.

Accusations Before Committing Magistrate.

See Criminal Law, 6, 7.

MANDAMUS.

Mandamus—Right to Remedy—Existence of Duty.

1. The writ of *mandamus* which constitutes the only initiatory pleading on the part of plaintiff under Section 618–620, L. O. L., must clearly indicate a present unperformed duty on the part of the defendant requisite for the preservation of the rights of the plaintiff, and is not aided by the petition either in the original or supplemental form. (Dryden v. Daly, 218.)

Mandamus—Right to Remedy—Vain Act.

2. Where plaintiff brought *mandamus* to compel reinstatement in municipal employ, and prior to the hearing he was restored to employment, the court was not required to do the vain thing of issuing the peremptory writ. (Dryden v. Daly, 218.)

Mandamus—Right to Remedy—Existence of Other Remedy.

3. Conceding that a municipal employee was wrongfully discharged he had an adequate remedy at law by an action against the city for damages, and therefore could not maintain *mandamus* to compel his reinstatement. (Dryden v. Daly, 218.)

Mandamus—Alternative Writ—School Tax Levy—County Assessor.

4. An alternative writ of *mandamus* against county officers to compel levy of a special school tax, failing to show in what three public places notices required by Section 4083, L. O. L., were posted, or that Laws of 1915, page 285, requiring publication of notice of school meeting, had been complied with, is insufficient. (Paine v. Wells, 695.)

Mandamus—Alternative Writ—Sufficiency.

5. An alternative writ of *mandamus* against county officers to compel levy of the full amount of special school tax voted, but failing to show that the district is not of the third class, or that the tax was not lowered by the district boundary board of the county under Laws of 1917, page 402, providing therefor in third-class districts, is insufficient. (Paine v. Wells, 695.)

Mandamus—Alternative Writ—Sufficiency.

6. An alternative writ of *mandamus* to compel county officers to levy a special school tax, failing to allege refusal to extend all of the tax, but not designating the part omitted from the rolls, is insufficient. (Paine v. Wells, 695.)

Mandamus—Sufficiency of Alternative Writ.

7. An alternative writ against the county assessor to compel the levy of a proposed voted school tax, which fails to allege that the tax would not exceed that of the preceding year by more than 6 per cent to comply with Laws of 1917, pages 192, 194, Sections 8, 12, is insufficient. (Paine v. Wells, 695.)

Mandamus—Laches.

8. *Mandamus* to compel county officers to levy a voted school tax, not filed until more than three months after the first half of the taxes were due, would, if granted, confuse the financial business of the county, and must be denied for laches. (Paine v. Wells, 695.)

See Appeal and Error, 15.

MAPS.

See Boundaries, 1.

MARSHFIELD, CHARTER OF.

See Bernitt v. City of Marshfield, 556.

MASTER AND SERVANT.

Master and Servant—Injuries to Servant—Failure to Guard Machinery—Burden of Proof.

1. In view of Laws of 1911, page 16, requiring employers to guard machinery, a servant injured by an unguarded machine has the burden of proving that it would have been practicable to have guarded it. (Camenzind v. Freeland Furniture Co., 158.)

Master and Servant—Injuries to Servant—Safe Place to Work.

2. In the absence of a statute, the master is only required to employ reasonable care in providing a safe place to work, and, if by due care and reasonable expense the employer can lessen the risk to the employee it is his duty to do so. (Camenzind v. Freeland Furniture Co., 158.)

Master and Servant—Injuries to Servant—Failure to Guard Machinery—Burden of Proof.

3. In determining whether the master has, as required by Laws of 1911, page 16, used every device and precaution which it is practicable to use for the safety of the servant, customary usage in the

trade is not necessarily a conclusive test of the performance of the duty. (Camenzind v. Freeland Furniture Co., 158.)

Master and Servant—Injuries to Servant—Failure to Guard Machinery—Burden of Proof.

4. Under such statute, the fact that others do not guard their machines does not of itself excuse any other employer from protecting his machine; nor does the fact that there are no guards on the market of itself relieve any employer from guarding against a danger. (Camenzind v. Freeland Furniture Co., 158.)

Master and Servant—Injuries to Servant—Failure to Guard Machinery—Evidence—Admissibility.

5. In servant's actions for injuries due to absence of guard from machine, evidence that a certain guard is used in Switzerland is admissible to show that it was practicable and reasonably possible to guard the machinery, but not to show that the particular guard used in Switzerland should be used. (Camenzind v. Freeland Furniture Co., 158.)

Master and Servant — Injuries to Servant — Guarding Machinery — Duties of Master.

6. If there are no guards on the market and none known to the employer, or if the guards on the market and those known to him are not reasonably suitable, he is nevertheless required to exercise the care, capacity and intelligence of a reasonably prudent and ordinarily intelligent person to suggest and fashion a reasonably suitable guard. (Camenzind v. Freeland Furniture Co., 158.)

Master and Servant — Injuries to Servant — Guarding Machinery — Duties of Master.

7. The employer must guard a dangerous machine when it is practicable to do so, and he performs that duty when he uses such a guard as reasonably accomplishes the purpose. (Camenzind v. Freeland Furniture Co., 158.)

Master and Servant—Employers' Liability Act—Character.

8. The Employers' Liability Act is remedial in abolishing fellow-servant, contributory negligence and assumption of risk defenses, and preventive in requiring the master to take active steps to lessen the possibility of injury. (Camenzind v. Freeland Furniture Co., 158.)

Master and Servant—Employers' Liability Act—Duties of Master.

9. The duties imposed on the master by the Employers' Liability Act are nondelegable, absolute and continuing. (Camenzind v. Freeland Furniture Co., 158.)

Master and Servant—Employers' Liability Act—Negligence Per Se.

10. Transgression of the Employers' Liability Act by the employer is negligence *per se* and is actionable. (Camenzind v. Freeland Furniture Co., 158.)

Master and Servant—Employers' Liability Act—"Use."

11. Laws of 1911, page 16, requiring the employer to use every safety device which is practicable, is satisfied only when the employer

not only provides a guard but sees to it that it is used, since the word "use" means to make use of, to employ. (Camenzind v. Freeland Furniture Co., 158.)

Master and Servant—Employers' Liability Act—Use of Guards.

12. Under Laws of 1911, page 16, requiring the master to use every practicable safety device, since the master's duty is continuous and nondelegable he must maintain the guards upon the machine unless the machine requires readjustment with each succeeding change of work. (Camenzind v. Freeland Furniture Co., 158.)

Master and Servant — Employers' Liability Act — Use of Guards — Duties of Master.

13. Even where the work requires constant readjustment of a machine, it is the master's duty under Laws of 1911, page 16, to see that the guard is constantly kept on the machine when practicable, since if the employee fails to attach it he merely fails to do an act which it is not his duty, but the master's to perform. (Camenzind v. Freeland Furniture Co., 158.)

Master and Servant—Workmen's Compensation Act—Construction.

14. Employers' Liability Act (Laws 1911, p. 16), requiring the use of all precautions for safety of employees by persons in construction or repair of any structure, or operation of machinery, or manufacture or transmission of electricity or the use of any dangerous appliance or substance, or machinery or shafts, wells, floor openings and requiring all owners, contractors and other persons having charge of or responsible for any work involving a risk or danger to the employees, or the public to use every device, care and precaution which is practicable, did not render the employer liable when he furnished a stepladder two or three feet high, not equipped with a hand-rail, or with other safeguards for use by a laundress hanging up washing, since the act applies only to employments beset with danger. (O'Neill v. Odd Fellows Home, 382.)

Master and Servant—Death of Railroad Employee—Evidence Admissible Under Pleadings—Rules and Regulations.

15. In action against railroad for death of employee in tunnel collision, evidence of failure to promulgate and enforce rules, tending to show negligence, is admissible under allegations of negligence in operation of train and in failure to have a light on lead car of train or in tunnel. (Brundage v. Southern Pac. Co., 483.)

Master and Servant—Railroads—Failure to Light Tunnel.

16. Railroad's failure to have a light in a tunnel 625 feet long and constructed on a seven-degree curve was not negligence, where its rules required employees operating motor-cars to exercise great caution and use stop signal where view of approaching train was obscured. (Brundage v. Southern Pac. Co., 483.)

Master and Servant—Railroads—Employee's Death—Tunnel Lights.

17. In action against railroad for death of employee in tunnel collision between employee's speeder and construction train, railroad's failure to have a light in the tunnel, which was 625 feet long and constructed on a seven-degree curve, where its rules required employees operating speeders to exercise caution and use stop signals, was improperly submitted to jury. (Brundage v. Southern Pac. Co., 483.)

Master and Servant—Death of Railroad Employee—Assumption of Risk—Unlighted Tunnel.

18. Where railroad telegraph inspector, having for more than 30 days used speeder, and knowing that a tunnel was without lights, and that construction trains backed through such tunnel without lights, was killed while in tunnel through collision with construction train, railroad is not liable; inspector having assumed risk. (Brundage v. Southern Pac. Co., 483.)

MATERIALMAN.

See Mechanics' Liens, 1, 2, 3.

MAXIMS.

See Equity, 2.

MECHANICS' LIENS.

Mechanics' Liens—Duplicate Statements—Statutes—Construction.

1. Laws of 1915, page 224, requiring, for the preservation of a materialman's lien, that the claimant furnish within 10 days a duplicate statement of the material to the owner is mandatory, and no lien can be established unless it is complied with. (Auld v. Starbard, 284.)

Mechanics' Liens—Effect upon Title—Priority.

2. A laborer's or a materialman's lien is in the nature of a shadow, which ultimately may, but does not, cloud the title of or attach to the real property benefited by an improvement until the prescribed notice has been filed in the proper office within the time allowed, when the charge, which the law imposes as security, relates back to the beginning of the work, thereby giving to each claimant an equality, but not a priority of right in proportion to his respective demand as compared with the amount of the entire statutory liens. (Auld v. Starbard, 284.)

Mechanics' Liens—Materialmen—Duplicate Statements.

3. Where plaintiff furnished material on a contract all of which was paid for and, later on the same contract, furnished other material, after the enactment of Laws of 1915, page 224, he could not have a materialman's lien for material last furnished, in the absence of a showing that within 10 days of the time he furnished it he rendered a duplicate statement to the owner of the property. (Auld v. Starbard, 284.)

Mechanics' Liens—Contractor—Evidence.

4. In a suit by a company to foreclose a lien for plumbing fixtures, etc., evidence *held* to show that the company, and not a party defendant who had done the plumbing work, etc., was the contractor. (Peerless Pacific Co. v. Manning, 691.)

Mechanics' Liens—Material—Agency—Payment.

5. A company contracting to furnish material might, if it wished, make the one performing the labor thereon its agent to receive payment, and could not complain that the owner made payments to such agent in reliance upon an express instruction from it. (Peerless Pacific Co. v. Manning, 691.)

Mechanics' Liens—Contractor—Evidence—Pleading.

6. In suit to foreclose lien for materials sold to a codefendant, designated as contractor and owner's agent, on his request, the owner's evidence that plaintiff, and not his codefendant, was the contractor, was admissible under an answer denying that codefendant was a contractor or agent, or that material was furnished at his request. (Peerless Pacific Co. v. Manning, 691.)

MILL-RACE.

See Highways, 6, 7.

MODIFICATION.

Modification of Decree.

See Divorce, 2.

MORATORIUM.

See Mortgages, 1.

MORTGAGES.

Mortgages—Moratorium.

1. Laws of 1917, page 515, Section 1, granting enlisted men in the Army or Navy or National Guard of the United States a moratorium as to mortgages, does not apply to one enlisting in the Oregon State Guard, whose only duty is to guard shipyards and other places of that character within the state. (Gearin v. Fleckenstein, 146.)

Mortgages—Stay of Execution—Counter-undertaking—"Contract."

2. Section 553, L. O. L., relating to counter-undertakings on stay of execution, applies to executions issued to enforce decrees of foreclosure; a mortgage being a "contract" within the meaning of that section. (Gearin v. Fleckenstein, 146.)

Mortgages—Priorities—Lien of—Purchaser of Property.

3. One who asserts the priority of a purchaser's lien on real property against subsequent purchasers and a mortgagee must show that the payments upon which his lien attaches were made prior to the mortgage or other liens. (First Savings Bank of Albany v. Linnhaven Orchard Co., 354.)

Mortgages—Priorities—Lien for Purchase Money.

4. In an action between the holder of a purchase-money lien and a mortgagee to determine priorities in real property, where the lienholder fails to allege that the payments under which he claims were made prior to the mortgage, it is not necessary for the mortgagee to show, under Section 7129, L. O. L., that the mortgage was acquired in good faith. (First Savings Bank of Albany v. Linnhaven Orchard Co., 354.)

See Payment, 1.

Rule as to Fixtures Between Mortgagor and Mortgagee.

See Fixtures, 6, 8.

MOTION.

See Injunction, 1.

MOTION TO STRIKE.

Necessity for.

See Trial, 4.

MUNICIPAL CORPORATIONS.

Municipal Corporations—Amendment of Charter—Ballot Title—Sufficiency.

1. The ballot title of an act amending the charter of a city, "Shall the proposed amendment of the charter of the City of La Grande, Oregon, including the amendment of said charter providing for reassessment of street improvements already made, be adopted," was sufficient as expressly directing attention to the amendment of the charter authorizing reassessments. (Wagoner v. City of La Grande, 192.)

Municipal Corporations — Street Improvements — Remonstrances — Amendment of Charter.

2. The language on the subject of remonstrances by property owners in the provisions of the charter of 1915 of the City of La Grande, as to reassessments for street improvements, is referable only to the provision of the same charter that if the owners of 55 per cent of the property affected, measured by the front foot, object, the commission shall be ousted of jurisdiction for six months, and have no application to remonstrances filed before amendment of the charter in 1913, when it contained no provision whereby remonstrance was effectual to defeat an improvement. (Wagoner v. City of La Grande, 192.)

Municipal Corporations—Street Improvements—Reassessment—Fraud.

3. The only fraud which will defeat a reassessment for a street improvement is fraud of the city council in the reassessment proceeding. (Wagoner v. City of La Grande, 192.)

Municipal Corporations — Street Improvement — Reassessment—Lack of Jurisdiction.

4. The council's lack of jurisdiction in the original proceeding for a street improvement will not defeat a reassessment therefor. (Wagoner v. City of La Grande, 192.)

Municipal Corporations — Street Improvement — Void Contract—Reassessment.

5. The fact that street improvement work was done under a void contract will not preclude a reassessment of the property, where the statute authorizes it. (Wagoner v. City of La Grande, 192.)

Municipal Corporations — Street Improvement — Price—Discretion of Council.

6. If the price for a street improvement was not so grossly excessive as to imply fraud, the matter of price was within the discretion of the city council. (Wagoner v. City of La Grande, 192.)

Municipal Corporations—Street Improvement—Review of City Council—Supreme Court.

7. In suit to enjoin the enforcement of municipal liens imposed to pay for a street improvement, the Supreme Court has not jurisdic-

tion to review the legislative acts of the city council in determining the question of benefits, and whether the improvement is out of proportion to the value of the objectors' property. (Wagner v. City of La Grande, 192.)

Municipal Corporations — Improvement — Objections — Showing of Record.

8. Where objections to a municipal street improvement involved questions of fact, the record must affirmatively show a finding upon them by the council. (Wagoner v. City of La Grande, 192.)

Municipal Corporations — Street Improvement — Creation of Assessment District—Reassessment.

9. The failure of the council of a city to create an assessment district for a street improvement prior to performance of the work did not preclude reassessment under the city charter to charge the property benefited with a portion of the cost commensurate with the special benefits. (Wagoner v. City of La Grande, 192.)

Municipal Corporations — Street Improvement — Single Contract for Paving, Curbing, etc.

10. It was within the discretion of the city council to let, in one contract for a street improvement, the work of excavation, drainage and curbing, all incidental to the paving. (Wagoner v. City of La Grande, 192.)

Municipal Corporations—Street Improvement—Competitive Bidding—Patented Material—License to Use.

11. That the city recorder, on filing by the owner of the patent, of license for the use of its patented gravel bitulithic pavement, put the paper where it was not readily found, and indexed it in a way which did not assist in the search for it, does not warrant ignoring it in determining whether the principle of competitive bidding was violated in the city's contract for such material improvement. (Wagoner v. City of La Grande, 192.)

Municipal Corporations — Street Improvements — Reassessments — Retroactive Powers.

12. The voters of a city, in amending its charter to give the city power to make reassessments for street improvements, could make such powers retroactive. (Wagoner v. City of La Grande, 192.)

Municipal Corporations — Reassessments — Charter Amendment—Construction.

13. Remedial legislation, as an amendment to a city's charter empowering it to make reassessments for street improvements, must be construed so as to effectuate the purpose of the electors in adopting it. (Wagoner v. City of La Grande, 192.)

Municipal Corporations—Street Improvement—Waiver of Defect.

14. Property owners who applied to pay street improvement liens on their property in ten annual installments, and, as required by Section 3245, L. O. L., expressly waived in their applications irregularity or defect, jurisdictional or otherwise, in the proceedings to improve the street, were concluded by such waiver, though a reassessment for the improvement was unauthorized. (Wagoner v. City of La Grande, 192.)

Municipal Corporations—Grant of Franchise—Acceptance—"Grant."

15. Under Portland City Charter, Section 94, giving city council the right to grant a franchise, the franchise does not become operative until grantee has accepted; the word "grant" implying offer by city and acceptance by company. (Portland v. Public Service Com., 325.)

Municipal Corporations—Franchise—Right to Make.

16. A city's right to grant franchise to street railway was as an agent of the state. (Portland v. Public Service Com., 325.)

Municipal Corporations—Police Power—Control of Property.

17. Act of 1893 (Section 3229, L. O. L.), conferred upon cities and towns incorporated under it general police power to regulate the use of private property, and a mill constructed without license before incorporation of town, in what was then a county road, and which is now maintained along and across a street, is no exception. (Gaston, Town of, v. Thompson, 412.)

Municipal Corporations—Control of Streets—County Roads.

18. Statute of February 21, 1913 (Laws 1913, p. 136), amounted to an offer on the part of the state to surrender to the town of Gaston the control over county roads within its corporate limits and initiative charter (April 14, 1914), by which the town assumed control over all public parks, etc., reasonably included what was formerly the county road in question, and operated as an acceptance of the offer. (Gaston, Town of, v. Thompson, 412.)

Municipal Corporations—Control of Streets—County Roads.

19. A mill-race constructed without license and before incorporation of the town of Gaston in what was then a county road, whether a nuisance or not, is subject to reasonable police regulation, after inclusion within corporate limits of said town. (Gaston, Town of, v. Thompson, 412.)

Municipal Corporations—Control of Streets.

20. Requiring defendant to keep mill-race maintained along a street of plaintiff, to be covered with planks sufficient for ordinary travel, is a reasonable exercise of the police power committed to plaintiff by statute of 1893 (Laws 1893, p. 119), and reasserted in initiative charter (April 14, 1914), and is properly classified as local, special and municipal legislation, under Article IV, Section 1a, of the Constitution, reserving initiative power to voters. (Gaston, Town of, v. Thompson, 412.)

Municipal Corporations—Control of Streets—Scope and Authority.

21. The existence of an open mill-race in the principal thoroughfare of a town primarily affects the local situation, and is within scope of authority of cities and towns, under Article XI, Section 2, of the Constitution, empowering the legal voters to enact and amend their charters. (Gaston, Town of, v. Thompson, 412.)

Municipal Corporations—Ordinances—Vacating Street—Dedication of Part of Street.

22. An ordinance attempting to vacate 10 feet on both sides of a street, and to dedicate such land to adjoining land owners, was merely

revocable permit to prepare portion of street as a kind of parking, where city had no authority to vacate street or dedicate portion thereof, and where it had retained dominion over the narrow tract by preventing erection of structure thereon, except fence. (Bernitt v. City of Marshfield, 556.)

Municipal Corporations—Attempted Dedication of Part of Street—Estoppel.

23. Where ordinance attempted to vacate 10 feet on both sides of a street, and to dedicate such land to adjoining land owners, and prescribed use to be made thereof by owners, but ordinance was unauthorized by its charter, and was mere permit, the improvement of the land by owners did not estop city from claiming land; such improvement being as directed by the ordinance, and not antagonistic to city. (Bernitt v. City of Marshfield, 556.)

Municipal Corporations — Sidewalks — Personal Injuries — Presenting Claims—"Claim for Damages."

24. Portland City Charter, Section 282, providing that "claims for damages" against the city must be presented to the auditor within six months after accrual, does not include claims arising *ex delicto* for personal injuries from defective sidewalks, from which liability Section 281 attempts to exempt the city. (Colby v. City of Portland, 556.)

Municipal Corporations—Clerk of Employment Bureau—Classification on Civil Service List.

25. Classifying clerk of Portland free employment bureau, created by Ordinance No. 20,035, on civil service list as superintendent, as was done by Ordinance No. 27,951, did not give him any authority; his duties being those of a subordinate under the board's direction. (Christenson v. Portland, 609.)

Municipal Corporations—Free Employment Bureau—Right to be Director—Ordinances.

26. Plaintiff having been clerk of Portland free employment bureau, created by Ordinance No. 20,035, with grade and title of superintendent under Ordinance No. 27,951, *held* not to entitle him to be appointed director of Portland public employment bureau, created by Ordinance No. 31,173. (Christenson v. Portland, 609.)

Municipal Corporations—Superintendent of Free Employment Bureau—Right to Office.

27. Ordinance No. 31,173 of City of Portland, creating public employment bureau, being merely revision of Ordinance No. 20,035, creating free employment bureau, superintendent of free bureau was not legislated out of his office, because its name was changed to that of director and its duties enlarged, and, having been wrongfully removed by mayor, he had substantial right to office under its new name, which was lost by failure to appeal as prescribed by Portland City Charter, Section 108. (Christenson v. Portland, 609.)

Municipal Corporations—Free Employment Bureau—Office of Clerk—Ordinance.

28. Though clerk of free employment bureau of Portland, created by Ordinance No. 20,035, was ranked as superintendent of bureau by Ordinance 27,951, as matter of law he was clerk of bureau, and, after

enactment of Ordinance No. 31,173, remained clerk of public employment bureau thereby created, subject to removal by mayor. (Christenson v. Portland, 609.)

Municipal Corporations—Officers—Break in Term—Abolition of Office.

29. If city ordinance professes to abolish office in one clause and in another to reinstate it, office has never been abolished in fact, and there has been no break in term of official. (Christenson v. Portland, 609.)

See Carriers, 4.

MUTUAL MISTAKE.

See Reformation of Instruments, 1.

NAMES.

Names—Common-law Right to Change.

1. Section 7093, L. O. L., empowering the County Court to hear and determine applications for change of names, does not abrogate the common-law right of a person to change his name. (State v. Ford, 121.)

NAVIGATION.

Respective Rights of Navigation and Fishing.

See Collision, 2, 3.

NEGLIGENCE.

Negligence — Workmen's Compensation Acts — Employers' Liability Acts—Construction.

1. Workmen's Compensation Act (Laws 1913, p. 194), Section 15, providing that it shall be no defense for the employer to show that injury was caused in whole or in part by the negligence of a fellow-servant, or that the negligence of the injured workman, other than his willful act, contributed to the accident, cuts off the defense of contributory negligence, but does not preclude the employer from pleading contributory negligence in reduction of recoverable damages as permitted by the Employers' Liability Act (Laws 1911, p. 16). (Camenzind v. Freeland Furniture Co., 158.)

NEGLIGENCE PER SE.

See Master and Servant, 10.

NEW TRIAL.

New Trial—Grounds for.

1. Since the trial court can grant a new trial on its own motion, it may set aside a verdict and grant a new trial on grounds other than those stated in a motion. (Cathcart v. Marshfield, 401.)

NOTICE.

See Agriculture, 6.
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See Statutes, 11.

PARTIES.

See Appeal and Error, 30, 32, 39.

Necessary Party Defendant.
See Trusts, 1.

PATENTS.

Patents—Assignment of Invention or Right to Patent.

1. In view of internationad convention of March 20, 1883, as modified by supplementary treaty concluded at Brussels December 14, 1900, and ratified by the United States August 25, 1902 (32 Stat. 1936), where defendants, having acquired some rights under the United States patent laws, at least by application for patents, filed application for patent in Great Britain, defendants' English rights, even before issuance of patent in Great Britain, constituted a property right which was the legitimate subject of contract and sale. (Hume v. Mears, 519.)

PAYMENT.

Payment—Application by Agreement.

1. Where owner of land encumbered with two mortgages, one of $4,000 and one of $5,000, sold the same, with agreement with the purchaser to execute a mortgage of $10,000 to pay off the two mortgages and apply balance to an unsecured debt, but agreed with mortgagee in new mortgage, of which agreement the purchaser had no notice, to pay off one mortgage and apply balance to unsecured debts, leaving one mortgage outstanding, except for payment of any balance of the $10,000 on the unpaid mortgage, there was no contractual relation between mortgagee and purchaser, so as to establish plea of payment by the purchaser of the whole of the unpaid mortgage. (Schirber v. Greene, 1.)

Payment—Pleading Time of Payment.

2. An answer setting out a contract to sell real estate upon which "defendants have paid the amount herein mentioned, to wit," followed by a statement of the name of each purchaser, description of land, date of contract, purchase price, and "amount paid" in dollars, does not fix the date of payments. (First Savings Bank of Albany v. Linnhaven Orchard Co., 354.)

See Mechanics' Liens, 5.

PERSONAL INJURIES.

See Limitation of Actions, 5.
See Master and Servant, 1–13.
See Municipal Corporations, 24.

PIPE-LINES.

See Fixtures, 2, 8.

PLAT.

Copied from Another Plat.

See Boundaries, 3.

PLEADING.

Pleading—Reply to Qualified Denial.

1. In trespass, where defendant set up qualified denial, plaintiff was not required to reply. (Boyd v. Grove, 80.)

Pleading—Amendments.

2. Courts should be exceedingly liberal in allowing amendments which are obviously in furtherance of justice, especially in regard to defendants, for while plaintiffs, if their pleadings are insufficient, may dismiss and begin again, defendants have no such opportunity. (Holden v. Gulstrom, 133.)

Pleading—Conclusions of Law.

3. The pleader should state facts upon which he bases his right to recover, rather than conclusions of law. (Dryden v. Daly, 218.)

Pleading—Conclusions of Law.

4. In *mandamus* by city employee to compel reinstatement under civil service rules, the allegation that "the position of calker and the position of meterman and tapper are positions within the definition of said class K, and that the plaintiff and petitioner was duly examined, classified and appointed as required by the charter provisions and rules and regulations of the civil service board of the City of Portland," is a mere conclusion of law. (Dryden v. Daly, 218.)

Pleading—Redundancy.

5. Where complaint alleged oral contract on June 16th to remodel building, and on completion of changes to lease to defendant for one year, and that on August 15th a lease for one year in accordance with the agreement was made operative by giving and taking possession, the allegations as to the contract of June 16th were unnecessary and redundant. (Thomas v. Peebler, 255.)

Pleading—Demurrer—When Proper.

6. Where answer, in action for price of machinery, disclosed breach of warranty, sought recovery for special damage for loss of profits, but failed to set out the facts entitling defendant to recover therefor, the plea was nevertheless not demurrable, being good for at least nominal damages, and the proper method of attack was by objection to the evidence. (Feeney & Bremer Co. v. Stone, 360.)

See Animals, 3.
See Election of Remedies, 1.
See Eminent Domain, 4.
See Habeas Corpus, 1.
See Landlord and Tenant, 3.
See Master and Servant, 15.
See Mechanics' Liens, 6.
See Principal and Agent, 5, 6.
See Sales, 11.
See Statute of Frauds, 1.

POLICE POWER.

See Carriers, 2.
See Constitutional Law, 3, 6.
See Municipal Corporations, 17.

PORTLAND, CHARTER OF.

See Christenson v. Portland, 609.
See Colby v. City of Portland, 566.
See Dryden v. Daly, 218.
See Portland v. Public Service Commission, 325.

POSSESSION.

See Bailment, 1.

Failure of Lessor to Give Lessee Possession.

See Landlord and Tenant, 5.

Possession of Chattels Under Executory Contract.

See Sales, 8, 9.

PRESUMPTIONS.

See Appeal and Error, 16.
See Deeds, 10, 13.
See Highways, 1.
See Specific Performance, 2, 3.

PRINCIPAL AND AGENT.

Principal and Agent—Creation of Relation.

1. Merely because a national bank cannot act as broker for loaning for a depositor, money which it has on deposit, arrangement by him with its president that it should do so does not make the president as an individual his agent. (Haines v. First Nat. Bank of Roseburg, 42.)

Principal and Agent—Authority to Loan.

2. Authority to agent to loan money does not authorize him to borrow the money for himself. (Haines v. First Nat. Bank of Roseburg, 42.)

Principal and Agent—Ratification—Knowledge.

3. Ratification of an agent's act, in exceeding his authority to loan by borrowing the money for himself, cannot be imputed to the principal merely because he was told that a loan was made, without being informed of the facts. (Haines v. First Nat. Bank of Roseburg, 42.)

Principal and Agent—Principal's Agreement to Convey to Agent—Independent Advice of Third Person.

4. Independent advice of a third person is not essential to support principal's agreement to convey land to his agent for a fair consideration. (Schlussel v. Hays, 463.)

Principal and Agent—Ratification—Effect.

5. When the principal, with knowledge of all facts, ratifies a transaction unauthorized when performed, he adopts the act as of the time of its performance, as much as if he had done it himself. (Masters v. Walker, 526.)

Principal and Agent—Pleading—Proof—Act of Agent.

6. Under an allegation that an act was done by defendant, plaintiff can show the act was done by defendant's agent, or that it was afterward ratified. (Masters v. Walker, 526.)

Principal and Agent—Action Against Agent—Pleading.

7. Plaintiff, seeking to hold a principal on account of his agent's act, later ratified, should allege the act directly as defendant's, and not state that the business was done by an agent, and later ratified by defendant. (Masters v. Walker, 526.)

Principal and Agent—Action for Fee—Question for Court.

8. In an attorney's action for a fee, he could show that defendant's general agent employed him in her behalf, and it was for the court to decide, from the facts shown, whether the act was within the agent's authority. (Masters v. Walker, 526.)

Principal and Agent—Existence or Extent of Agency—Question of Law and Fact.

9. If there is a dispute about the extent of an agency, a mixed question of law and fact is presented, which should be submitted to the jury. (Masters v. Walker, 526.)

Principal and Agent—Existence or Extent of Agency—Question of Law and Fact.

10. If there is a dispute about the existence of an agency, a mixed question of law and fact is presented, which should be submitted to the jury. (Masters v. Walker, 526.)

Principal and Agent—Undisclosed Principal—Burden of Proof.

11. In an action for the value of a carload of lumber, defendant, setting up counterclaims on the ground its sale of lumber to a corporation was a sale to its officers and stockholders, including plaintiffs, and that as undisclosed principals they were liable for the corporation's default in payment, had the burden of proof. (Leudinghaus Bros. v. Dant & Russell, 591.)

Principal and Agent—Undisclosed Principal—Sufficiency of Evidence.

12. In an action by a partnership for the value of a carload of lumber, evidence *held* not to sustain counterclaims on account of lumber delivered by defendant to a corporation, on the ground that such sale was a sale to plaintiffs as undisclosed principals. (Leudinghaus Bros. v. Dant & Russell, 591.)

PROFITS.

Anticipated Profits.

See Sales, 18, 21.

Loss of Profits.

See Sales, 20.

PUBLIC BENEFIT.

See Drains, 2, 3, 5.

PUBLIC SERVICE COMMISSION.
See Carriers, 1, 3, 4.

PURCHASE MONEY.
Recovery of Purchase Price.
See Vendor and Purchaser, 2.
Lien for Purchase Money.
See Vendor and Purchaser, 6.

QUANTUM MERUIT.
See Work and Labor, 1, 2.

QUESTION FOR COURT.
See Evidence, 7.
See Principal and Agent, 7–9.
See Trial, 2.

QUESTION FOR JURY.
See Criminal Law, 3.
See Homicide, 2.
See Principal and Agent, 7–9.

RAILROADS.
Railroads—Regulation—Fencing—Statutes.
1. Section 6972, L. O. L., making a railroad company liable for injury to livestock for failure to fence, is not repealed by Section 6979, requiring the maintenance of fences along railroad tracks for the protection of travelers; the two statutes being cumulative and not enacted to accomplish the same purpose. (Swensen v. Southern Pac. Co., 275.)
Railroads—Regulation—Fencing.
2. In the absence of statute, there is no duty to fence a railroad. (Swensen v. Southern Pac. Co., 275.)
See Master and Servant, 15–18.
Failure of Employee to Observe Rules and Regulations.
See Master and Servant, 15–18.

RATES.
See Carriers, 1–4.
See Corporations, 2.

RATIFICATION.
See Agriculture, 5.
See Principal and Agent, 3, 4.

REASSESSMENT.
See Municipal Corporations, 3–5, 9, 12, 13.

RECORDS.

See Appeal and Error, 5, 17, 18.
See Chattel Mortgages, 2.
See Highways, 2, 5.
See Municipal Corporations, 8.

REDUNDANCY.

See Pleading, 5.

REFEREE.

Special Referee to Take Depositions.
See Equity, 1.

REFORMATION OF INSTRUMENTS.

Reformation of Instruments—Mutual Mistake—Burden of Proof.

1. In suit to reform a contract on the ground of mutual mistake, the burden is on the plaintiff to clearly show the mistake and that it was mutual. (School Dist. No. 4 v. Hartong, 155.)

REINSTATEMENT.

Application for Reinstatement of Lapsed Policy.
See Insurance, 1.

REMONSTRANCES.

See Municipal Corporations, 2.

REPEAL.

Repeal by Implication.
See Criminal Law, 2.
See Statutes, 5–9.

Effect on Pending Legislation.
See Statutes, 20.

REPLEVIN.

Replevin—Satisfaction of Judgment—Effect.

1. Where owner of wheat attached by sheriff secured judgment against sheriff for the wheat or its value and accepted the assessed value in cash from the sheriff, title was transferred to the sheriff. (Davidhizer v. Elgin Forwarding Co., 89.)

Replevin—Satisfaction of Judgment—Effect.

2. Where sheriff with attachment against a debtor levied it on wheat found in possession of the debtor's brother, and took the wheat to recover which the brother maintained replevin, securing judgment for the wheat or its value, and accepted the cash value of the wheat, it was immaterial whether the forms for attaching property in the hands of a third person were followed, since the satisfaction of the judgment in replevin transferred the title to the sheriff. (Davidhizer v. Elgin Forwarding Co., 89.)

RESCISSION.

See Sales, 12.
See Vendor and Purchaser, 1–4.
See Work and Labor, 1.

REVIEW.

See Appeal and Error, 4, 6, 14, 17–19, 21, 25, 26.
See Constitutional Law, 1.
See Exceptions, Bill of, 2.
See Highways, 2.
See Municipal Corporations, 7.

REVIVAL.

Contract for Purchase.

See Vendor and Purchaser, 4.

SALES.

Sales—Transfer of Title—Executory Contracts.

1. A letter confirming sale of wheat to be delivered upon certain terms as soon as threshed was a mere executory contract, passing no present title, and insufficient to support replevin by the purchaser of the wheat. (Davidhizer v. Elgin Forwarding Co., 89.)

Sales—Transfer of Title—Executory Contracts—Performance—Acts in Derogation.

2. Where owner of wheat had executory contract to sell it to defendant, but on the way to the warehouse it was attached by the sheriff, who sent note to defendant, requiring it to hold the wheat for it, the owner's act in delivering the wheat was not in performance, but in derogation of the contract to sell the wheat, and the defendant acquired no title, but merely possession as bailee of the sheriff. (Davidhizer v. Elgin Forwarding Co., 89.)

Sales—Transfer of Title—Delivery to Sheriff.

3. Where a third person contracted to sell wheat to defendant, and while he was delivering it, it was attached by the sheriff, since it was competent for him, under Section 304, L. O. L., to deliver the property to the sheriff, when the sheriff then delivered it to the defendant as his own bailee and received warehouse receipts from defendant, defendant could not say that the delivery amounted to performance of the executory contract. (Davidhizer v. Elgin Forwarding Co., 89.)

Sales—Transfer of Title—Property not in Existence.

4. One cannot presently convey title to property which is not in existence. (Gile & Co. v. Lasselle, 107.)

Sales—Contract for Future Delivery—Title.

5. One may make a contract for future delivery, though he has no property of the kind on hand when the contract is made. (Gile & Co. v. Lassele, 107.)

Sales—Sale of Crop—Passing of Title.

6. Provision of contract for sale of year's crop of prunes that it is understood by both parties to constitute an absolute sale, and

that seller assumes all risk of loss or damage until delivery, amounts to no more than saying that when the terms of the writing have been fulfilled the result will be an absolute sale. (Gile & Co. v. Lasselle, 107.)

Sales—Executory Contracts—Passing Title.

7. To pass title under an executory contract there must be some further act of the parties amounting to performance of executory feature when property actually comes into existence and possession of seller. (Gile & Co. v. Lasselle, 107.)

Sales—Executory Contract—Right of Possession.

8. Contract for sale of year's crop of prunes, providing that it constitutes an absolute sale, that seller assumes risk of loss or damage until delivery, that buyers agreed to pay for said crop when delivery is completed, etc., was executory, and buyers were not entitled to possession until they performed concurrent covenant of paying at time of delivery; such covenant not having been waived. (Gile & Co. v. Lasselle, 107.)

Sales—Remedy of Buyer—Recovery of Goods.

9. Since a claim under an executory contract for the sale of a year's crop of prunes will not support replevin by the buyers against the seller, replevin will not lie against defendant who purchased prunes after seller got possession and before plaintiff buyers performed concurrent covenant of paying at time of delivery. (Gile & Co. v. Lasselle, 107.)

Sales—Breach of Warranty—Reliance and Inducement.

10. In action for breach of warranty, plaintiff must show that the warranty was relied on and that it was an operative cause, although it need not have been the sole inducement. (Feeney & Bremer Co. v. Stone, 360.)

Sales—Pleading—Breach of Warranty.

11. In action for breach of warranty of personal property, the purchaser must allege he relied upon the warranty and was thereby deceived. (Feeney & Bremer Co. v. Stone, 360.)

Sales—Rescission—Breach of Warranty—Return of Property.

12. The purchaser of a machine may rescind the contract and return the machine within a reasonable time after delivery, if it is not as warranted. (Feeney & Bremer Co. v. Stone, 360.)

Sales—Contracts—Remedies of Purchaser.

13. Generally, in a contract of sale, in the absence of language evidencing an intention to make a given remedy, such as a right given to the purchaser to retain without charge the article, if not as warranted, exclusive of all others, such remedy will be deemed cumulative and permissive rather than exclusive and mandatory. (Feeney & Bremer Co. v. Stone, 360.)

Sales—Warranty—Remedies of Purchaser.

14. A purchaser's right to proceed on the warranty in his sale contract was not destroyed by the seller's agreement that if the property sold were not as warranted the purchaser could keep it without pay-

ing for it, especially when the purchaser waived any right arising out of the promise not to charge and sued on the warranty. (Feeney & Bremer Co. v. Stone, 360.)

Sales—Breach of Warranty—Damages.

15. When the seller of personal property has breached his express warranty to furnish an article of a specified kind, quality or condition, he is liable, as in the case of any other kind of a contract, for both general and special damages. (Feeney & Bremer Co. v. Stone, 360.)

Sales—Breach of Warranty—Effect of Acceptance.

16. Acceptance of property sold does not of itself preclude the buyer from recovering damages for breach of warranty. (Feeney & Bremer Co. v. Stone, 360.)

Sales—Breach of Warranty—Damages—Expenses.

17. If buyer of a machine was obliged, because the machine bought did not work, to rent another machine to prevent loss to himself, he was entitled to reimbursement from the seller to the extent such expense was extra in character and reasonable in amount. (Feeney & Bremer Co. v. Stone, 360.)

Sales—Breach of Warranty—Anticipated Profits.

18. The theory of the law being to award compensation for gains prevented and losses sustained, and anticipated profits not being nonrecoverable merely because they are such, if it is reasonably certain that the breach of a contract has deprived the complaining party of a profit which was contemplated or can reasonably be presumed to have been contemplated by the parties at the time the contract was made, then the party committing the breach is liable for the loss of the profit. (Feeney & Bremer Co. v. Stone, 360.)

Sales—Breach of Warranty—Special Damages.

19. In order to recover special damages for a breach of warranty, the buyer must allege and prove that the special damages claimed by him are such as were contemplated, or may reasonably be said to have been contemplated, by the parties at the time they made the contract. (Feeney & Bremer Co. v. Stone, 360.)

Sales—Special Damages—Loss of Profits.

20. If at the time of sale of a hoist the seller did not know that the buyer intended to use it in the sale of gravel to the public, the buyer could not recover loss of profits on account of the seller's breach of warranty of the hoist, since it could not be said the parties contemplated such loss as a result of breach. (Feeney & Bremer Co. v. Stone, 360.)

Sales—Breach of Warranty—Anticipated Profits.

21. In action for price of machinery to be used in loading gravel, defended on ground of breach of warranty, the purchaser could not recover anticipated profit on mere allegation that he could have sold the gravel, in the absence of showing that he had definitely contracted to that effect; the damages being too remote. (Feeney & Bremer Co. v. Stone, 360.)

Sales—Breach of Warranty—Damages.

22. Where defendant purchased machinery for loading gravel, but because of breach of warranty of the machinery was prevented from selling the gravel or handling it, since he still had the gravel, his measure of damages was the difference between the contract and the market price of the gravel, constituting the profit which he lost. (Feeney & Bremer Co. v. Stone, 360.)

Sale of Realty and Personalty En Masse.

See Execution, 1, 2.

SETOFF AND COUNTERCLAIM.

See Landlord and Tenant, 8.

SIDEWALKS.

See Municipal Corporations, 24.

SPECIFIC PERFORMANCE.

Specific Performance—Parol Agreement—Interest in Land.

1. In order that a parol agreement, creating an interest in real property, may be enforced, it must be clear, definite, just, reasonable and mutual in all its parts. (Schlussel v. Hays, 463.)

Specific Performance—Confidential Relationship of Parties—Presumption of Invalidity.

2. Where plaintiff assisted sixty-nine year old widow in the management of her property, secured tenants, collected rents and advised her in business matters, the relationship was confidential, and latter's parol agreement to convey land to former in suit for specific performance is presumed to be invalid. (Schlussel v. Hays, 463.)

Specific Performance—Degree of Proof—Presumption of Invalidity.

3. In action for specific performance of parol agreement to convey land, where plaintiff had for many years assisted promisor in the management of her property and advised her concerning her business affairs, the presumption of invalidity of the agreement raised by confidential relationship of the parties can be overcome only by clear proof of good faith of former and full knowledge and independent consent of latter. (Schlussel v. Hays, 463.)

Specific Performance—Sufficiency of Evidence—Parol Agreement to Convey.

4. In action for specific performance of parol agreement to convey bungalow, evidence *held* to show that owner agreed to convey bungalow to plaintiffs in consideration of their being married and boarding and caring for her the remainder of her life. (Schlussel v. Hays, 463.)

Specific Performance—Oral Contract to Convey Realty—Proof—Sufficiency.

5. In suit for specific performance of oral contract to convey realty, it is required first that the contract itself be clearly proved; the remaining question being whether there has been sufficient show-

ing of part performance to take the case out of the statute of frauds. (Hayes v. Hayes, 630.)

Specific Performance—Proof of Contract—Sufficiency.

6. In suit by plaintiff to enforce against the other heirs and administrator of his deceased father a parol agreement by deceased to convey to plaintiff 50 acres of land, *held*, that oral contract to convey was sufficiently proven. (Hayes v. Hayes, 630.)

Specific Performance—Oral Contract to Convey—Defense.

7. In suit by plaintiff to enforce against other heirs and administrator of his father a parol agreement to convey 50 acres of land, it was no defense that before bringing suit plaintiff had offered to convey his interest in remainder of father's estate, if defendants would transfer to him all possible interest in the 50 acres. (Hayes v. Hayes, 630.)

STATUTE OF FRAUDS.

Statute of Frauds—Pleading—Demurrer—Leases—Validity.

1. A complaint alleging an oral contract on June 16th to remodel a building, and on completion of changes to lease to defendant for one year, and that on August 15th a lease for one year in accordance with the agreement was made operative by giving and taking possession, was not demurrable as pleading an invalid contract under Section 808, subdivision 6, L. O. L., making void a lease for a period longer than one year. (Thomas v. Peebler, 255.)

Frauds, Statute of—Oral Contract to Convey—Evidence.

2. Possession relied upon to take the case of an oral contract to convey out of the statute of frauds must be marked and certain, and referable only to such contract. (Hayes v. Hayes, 630.)

Frauds, Statute of—Part Performance of Oral Contract to Convey Realty—Evidence.

3. Where father offered his son a farm, provided the son would work for him until the farm was paid for, part performance, sufficient to take the case out of the statute of frauds, would be established by the son's performance of labor, taking possession of and making permanent improvements on farm, and the father's marking out the line of division and building fence on boundary. (Hayes v. Hayes, 630.)

STATUTES.

Statutes—Construction—Intention of Legislature.

1. A statute should be construed according to the intention of legislature enacting it, which can only be discerned by considering the statute and section as a whole. (Warm Springs Irr. Dist. v. Pacific Livestock Co., 19.)

Statutes—Construction.

2. Effect must be given to all the terms of a general statute, and where general terms or expressions in one part are inconsistent with more specific or particular provisions elsewhere, the particular provisions will be given effect as clearer and more definite expressions of the legislative will. (Barnes v. Massachusetts Bonding Co., 141.)

Statutes—Sufficiency of Title—Amendment of City Charter.

3. The title, "An act to amend the charter of the city of La Grande in Union County, State of Oregon," was sufficient. (Wagoner v. City of La Grande, 192.)

Statutes—Local Laws—Initiative—Powers of People of County.

4. Article IV, Section 1a, of the Constitution, providing that the initiative and referendum powers reserved to the people by the Constitution are further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation of every character in and for their respective municipalites and districts, does not confer on the voters of a county power to adopt a law, authorizing the County Court to levy taxes for the payment of bounties on jackrabbits, in the absence of any enabling act passed by the legislature, or by the people of the whole state granting such power to the people of a county. (Carriker v. Lake County, 240.)

Statutes—Repeal by Implication.

5. A repeal by implication may be effected when a later conflicts with a prior statute, when one is intended as a substitute for another. (Swensen v. Southern Pac. Co., 275.)

Statutes—Repeal by Implication—Conflict.

6. One statute will not be presumed to be repealed by another, unless the two are so obviously in conflict that both cannot be executed. (Swensen v. Southern Pac. Co., 275.)

Statutes—Repeal by Revision.

7. If the new statute revises the subject matter of the old, and is plainly intended as a substitute, it will repeal the old statute. (Swensen v. Southern Pac. Co., 275.)

Statutes—Repeal—Repugnancy.

8. One statute is not repugnant to another, unless they relate to the same subject, and are enacted for the same purpose. (Swensen v. Southern Pac. Co., 275.)

Statutes—Implied Repeal.

9. If the objects of two statutes are not the same, they will be permitted to stand, although referring to the same subject. (Swensen v. Southern Pac. Co., 275.)

Statutes—Construction—Statutes Adopted from Other States.

10. Where a statute, after having been construed by the court of last resort in the state where the law was enacted, is adopted in Oregon, the interpretation thus given, though not binding upon the courts of Oregon, affords persuasive argument that it should be followed here. (Auld v. Starbard, 284.)

Statutes—Subjects and Titles of Acts—Paroles.

11. Under Article IV, Section 20, of the Constitution, providing that an act shall embrace but one subject, which shall be expressed in title, Laws of 1917, Chapter 302, Section 17, is void in so far as it limits parole by court, the act relating to executive paroles and its title making no mention of Laws of 1911, Chapter 108, of which such Section 17 would be an amendment. (State v. Chong Ben, 313.)

Statutes—Construction—Adoption from Other State.

12. It is a general rule that when one state adopts the law of another, and that law has been construed by the highest court of the latter state, such construction will be followed. (Studley v. Luse, 338.)

Statutes—Construction—General and Special Words.

13. Where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned, unless the legislative intent appears to the contrary. (O'Neill v. Odd Fellows Home, 382.)

Statutes—Amendment—Setting Forth Act Amended—Budget Law.

14. Laws of 1915, page 297, merely declaring all districts, with certain exceptions, subject to Laws of 1913, page 458, the budget law provided for counties contravenes Article IV, Section 22, of the Constitution, inhibiting revising of amendment of an act by mere reference to its title, and requiring the act revised or section amended to be set forth in full. (Martin v. Gilliam County, 394.)

Statutes, Subjects and Titles.

15. Section 5126, L. O. L., as to persons having the right to water privilege not being required to construct or keep in repair any bridge across any mill-race, etc., being a part of an act of territorial legislature entitled "An act fixing the rate of toll for grinding," is of no force, in view of Enabling Act, Section 6, as to every law embracing but one subject expressed in its title. (Gaston, Town of, v. Thompson, 412.)

Statutes—Amendment by Reference to Title Only.

16. Statute of February 21, 1913 (Laws 1913, p. 136), granting to the town of Gaston exclusive control over county roads within its corporate limits, cannot, in so far as it attempts to amend the general law, be considered, since it does not set out the part of the statute as amended, as required by Article IV, Section 22, of the Constitution. (Gaston, Town of, v. Thompson, 412.)

Statutes—Validity—Unconstitutionality of Part.

17. An entire statute is not invalid because one or more of the details or minor provisions or incidental clauses are unconstitutional, where invalid part may be eliminated without materially affecting the general purpose. (Drainage Dist. No. 7 v. Bernards, 531.)

Statutes—Partial Invalidity.

18. Section 6136, L. O. L., as amended by Laws of 1911, page 424, providing for notice of assessment for drainage benefits by posting on bulletin in the courthouse and in such other manner as County Court may prescribe, *held* not invalid even though provision as to posting be declared invalid because of uncertainty; any notice by posting or publication being sufficient to satisfy "due process of law" requirement, and elimination of invalid part leaving valid remainder which gives court power to prescribe method of notice. (Drainage Dist. No. 7 v. Bernards, 531.)

Statutes—Construction—Change of Statute.

19. A change of statute will ordinarily be construed, if practicable, as having a prospective operation only. (Drainage Dist. No. 7 v. Bernards, 531.)

Statutes—Repeal—Effect on Pending Litigation.

20. The general rule is that the repeal of a statute without any reservation takes away all remedies given by repealed statute and defeats all actions pending under it at the time of its repeal; but, where repealing act relates to matters of procedure and substitutes new forms in place of old pending actions and proceedings already taken are not affected. (Drainage Dist. No. 7 v. Bernards, 531.)

Statutes—Title—Initiative.

21. Article IV, Section 20, of the Constitution, providing that every act shall embrace but one subject, etc., applies to an act adopted by the people in the exercise of the power of the initiative. (Turnidge v. Thompson, 637.)

Statutes—Construction—Title.

22. Since every act must have a title expressing the subject matter, the title necessarily becomes a part of the act, and offers valuable help in construing the act and determining the legislative intent. (Turnidge v. Thompson, 637.)

See Agriculture, 1–3, 6.
See Appeal and Error, 36, 38, 39, 41.
See Bills and Notes, 1, 9, 10.
See Carriers, 4.
See Criminal Law, 1, 2.
See Drains, 4–6.
See Eminent Domain, 5.
See Equity, 1.
See Larceny, 1.
See Limitation of Actions, 2, 5.
See Mechanics' Liens, 1.
See Railroads, 1.

STAY.

See Appeal and Error, 11.
See Mortgages, 2.

STREET IMPROVEMENTS.

See Boundaries, 2.
See Constitutional Law, 1.
See Municipal Corporations, 2–12, 14.
See Taxation, 1.

STREETS.

Control of Streets.

See Municipal Corporations, 17–21.

Vacating Street.

See Municipal Corporations, 22.

SURVEYS.

See Boundaries, 1, 3.
See Constitutional Law, 10.

SWAMP-LAND.

See Drains, 3.

TAXATION.

Taxation—Liens for Taxes and Special Assessments—Priorities.

1. Under Sections 3540–3735, L. O. L., as to revenue and taxation, a lien for general taxes, although subsequent in time, is prior and superior to a lien for special assessments for street improvement made by City of Eugene pursuant to Section 58 of its charter, as to priority of lien for special assessment, and owner of lien for general taxes is entitled to foreclose it without first paying the city the amount of the special assessment. (Studley v. Luse, 338.)

TENANT.

See Landlord and Tenant, 3.

TENDER.

See Eminent Domain, 4, 5.

TIME.

See Bailment, 2.
See Limitation of Actions, 5.

TITLE.

Effect on Mechanic's Lien.

See Mechanics' Liens, 2.

Transfer of Title.

See Sales, 1–7, 9.

Of Legislative Act.

See Statutes, 3, 15, 16, 21, 22.

TORTS.

See Charities, 1, 2.

TRESPASS.

See Animals, 1–3.
See Appeal and Error, 7.
See Evidence, 2–5.
See Trial, 2.

TRIAL.

Trial—Instructions—Conformity to Evidence.

1. An instruction framed on a theory of facts of which there is no evidence is properly refused. (Haines v. First Nat. Bank of Roseburg, 42.)

Trial—Instructions—Questions of Law.

2. In trespass instruction that plaintiff should minimize his damages, and that the jury could consider all circumstances in evidence in determining whether it was plaintiff's duty to act on the issue of damages, was not objectionable as submitting to the jury a question of law. (Boyd v. Grove, 80.)

Trial—Instructions—Requests.

3. In trespass instruction that plaintiff should minimize his damages, and that the jury could consider all circumstances in evidence in determining whether it was plaintiff's duty to act on the issue of damages, was good, as far as it went, and in the absence of a request stating the law more specifically, defendants are not entitled to complain on this ground. (Boyd v. Grove, 80.)

Trial—Rebuttal Evidence—Scope—Motion to Strike.

4. In trespass, where defendants gave their version of a conversation with plaintiff in which they sought to compromise, plaintiff's rebuttal, giving his version, should have been limited to testimony bearing on that before given; but improper details need not be stricken without proper motion. (Boyd v. Grove, 80.)

Trial—Argumentative Instructions—Refusal.

5. In replevin, where plaintiff claimed the property in its own right and defendant claimed it as bailee for his principal and also sought damages for detention, a requested instruction that the only damages that could be assessed against plaintiff is the sum of one cent per pound for the property taken from defendant, as defendant pleads the property right to have been in a named person and defendant's interest in said property to have been only a contract to process at a stipulated price per pound, *held* argumentative and misleading under pleadings and evidence and properly refused in view of Section 153, L. O. L., making a distinction as to the value of the property and damages for its detention. (Gile & Co. v. Lasselle, 107.)

Trial—Instructions—Responsiveness to Issues.

6. The refusal of instructions requested upon the assumption that a chattel mortgage executed by defendant's partner to plaintiff was invalid because it attempted to hypothecate an undivided half interest in partnership property to secure an individual debt was not error, where defendant's liability was predicated upon another contract. (Davidson v. Madden, 209.)

Trial—Direction of Verdict—Conflicting Evidence.

7. Where there was evidence upon both sides of the issue, the judge properly refused to give a peremptory instruction. (First Sav. Bank of Albany v. Macneill, 216.)

Trial—Instructions—Construction as a Whole.

8. Instruction as a whole, in action for collision of a steamer with a fishing boat, *held* not open to construction of meaning that it would be negligence for the steamer to be outside the fairway. (Horst v. Columbia Contract Co., 344.)

Trial—Instructions—Applicability to Evidence.

9. Requested instruction that a vessel need not yield the channel to a fishing net need not be given; it not appearing the fishing net or boat was in the channel. (Horst v. Columbia Contract Co., 344.)

Trial—Instructions—Evidence—Violation of Rules.

10. In action for death of employee caused by collision in tunnel while employee was riding a speeder, where defendant interposed defense of contributory negligence and a rule requiring employees using speeders to use stop signals or walk when view of track is obscured was introduced in evidence, an instruction, restricting jury's consideration of evidence of violation of such rule to the rate of speed employee was traveling, *held* improper. (Brundage v. Southern Pac. Co., 483.)

Where Trial is De Novo, Cause will not be Remanded.

See Appeal and Error, 27.

TRUST RELATIONSHIP.

See Deeds, 2, 3.

TRUSTEE.

Conveyance to Trustee.

See Deeds, 4, 5.

TRUSTS.

Trusts—Necessary Defendant.

1. In an action to have a trust declared on a certain certificate of sale in a mortgage foreclosure on the ground of fraud of the attorney in obtaining from plaintiff's decedent an assignment of the mortgage, an assignee of the certificate is a necessary party defendant, who can be brought in under Section 41, L. O. L., providing that, when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in, although the certificate has not been recorded as required by Section 7131, providing that, if such assignments are not recorded, they shall be void as against subsequent purchasers in good faith. (Watt v. Reeves, 151.)

Trusts—Transfer of Interest in Corporation—Evidence.

2. Plaintiff's allegations that he transferred corporation stock and plant, in consideration of its being financed and made to pay, and that a subsequent sale of the plant by a corporation organized to take over the business merely operates as a transfer in trust of the plaintiff's interest, *held* not supported by the evidence. (Akin v. Bates, 260.)

Trusts—Conveyance to Trustee—Independent Advice.

3. The principle that a deed from *cestui que trust* to trustee will be upheld only when the former has acted under independent advice, applies only to cases whereby ill health, mental infirmity, immaturity or otherwise, the party whose deed is attacked is one not likely to act wisely without disinterested advice, for a party of normal mentality is entitled to dispose of his own as he sees fit. (Rowe v. Freeman, 428.)

UNDERTAKING.

Failure to Serve.

See Appeal and Error, 20.

UNDISCLOSED PRINCIPAL.

See Principal and Agent, 10, 11.

UNDUE INFLUENCE.

See Deeds, 1, 8, 9, 11.

VARIANCE.

See Contracts, 2.

VENDOR AND PURCHASER.

Vendor and Purchaser—Rescission of Contract by Agreement—Abandonment of Rights.

1. Where purchaser rescinds contract and sues vendor for money paid thereon and for value of improvements made, vendor by interposing counterclaim for rent, thus recognizing purchaser as tenant, assents to such rescission, and terminates contract, regardless of whether purchaser had good ground for rescission. (Woodard v. Willamette Val. Irr. Land Co., 10.)

Vendor and Purchaser—Rescission—Recovery of Purchase Price.

2. Where a contract for sale of land has been rescinded by mutual assent, the purchaser, where there is no agreement to the contrary, may recover the amount paid on the purchase price. (Woodard v. Willamette Val. Irr. Land Co., 10.)

Vendor and Purchaser—Abandonment of Contract by Vendor—Rights of Purchaser.

3. Where an irrigation company selling land fails to supply the water called for by the contract of sale, the purchaser may elect to rescind the contract and recover what he has paid thereon. (Woodard v. Willamette Val. Irr. Land Co., 10.)

Vendor and Purchaser—Rescission—Revival.

4. Where purchaser rescinding contract sues for money paid thereon, the vendor, by acquiescing in such rescission by interposing a counterclaim and treating purchaser as tenant, terminates the contract, and cannot by waiving such counterclaim revive it. (Woodard v. Willamette Val. Irr. Co., 10.)

Vendor and Purchaser—Remedies of Purchaser—Lien for Purchase Money.

5. A purchaser under a contract for the sale of real property has a lien on the property for the purchase price paid, which, upon breach by the vendor, can be enforced by a decree ordering the sale of the property. (First Sav. Bank of Albany v. Linnhaven Orchard Co., 354.)

Vendor and Purchaser—Remedies of Purchaser—Lien for Purchase Money—Priorities.

6. The purchaser's equitable lien against the land for the amount of the price paid does not attach until the time of payment, and in

an action to determine priorities, the failure of the purchaser to allege or prove date of payment bars an investigation of his claim of priority. (Green v. Linnhaven Orchard Co., 513.)

VERDICT.

See Appeal and Error, 12.

Setting Aside Verdict.

See Appeal and Error, 19.

VESTED RIGHTS.

See Constitutional Law, 10.

VIEWERS.

Appointment of and Report as to Damages.

See Highways, 3–5.

WAIVER.

See Municipal Corporations, 14.

WARRANTIES.

See Insurance, 1.

WARRANTY.

Breach of Warranty.

See Damages, 4.
See Sales, 10–12, 15–19, 21, 22.

WILLS.

Wills—Contract to Devise Realty—What Constitutes—"Give."

1. Even if father said to his son, "I will give you 50 acres, if you will work for me until the farm is paid for," where the son accepted the offer and performed the work, the result would be a contract; the use of the word "give" not showing purpose of father to make a will. (Hayes v. Hayes, 630.)

WITNESSES.

Permitting Witness to Construe Contract.

See Appeal and Error, 8.

Credibility of Witnesses.

See Appeal and Error, 25.

Examination of Witness.

See Evidence, 2.

WORDS AND PHRASES.

Words and Phrases—"Fairway."

1. A "fairway" is water on which vessels of commerce habitually move. (Horst v. Columbia Contract Co., 344.)

"Adverse party"—See In re Waters of Chewaucan River, 659.
"Claim for damages"—See Colby v. City of Portland, 566.
"Clearing land"—See Craig v. Crystal Realty Co., 25.
"Concise statement"—See Schmid v. Thorsen, 575.
"Contract"—See Gearin v. Fleckenstein, 146.
"Deposit"—See Moumal v. Parkhurst, 248.
"Diking"—See Craig v. Crystal Realty Co., 25.
"Ditching, diking or tiling"—See Craig v. Crystal Realty Co., 25.
"Evicted"—See Moumal v. Parkhurst, 248.
"Eviction"—See Schmid v. Thorsen, 575.
"Fairway"—See Horst v. Columbia Contract Co., 344.
"Fiduciary relation"—See Rowe v. Freeman, 428.
"General appearance"—See In re Waters of Chewaucan River, 659.
"Give"—See Hayes v. Hayes, 630.
"Grant"—See Portland v. Public Service Com., 325.
"Liquidated damages"—See Moumal v. Parkhurst, 248.
"Party"—See In re Waters of Chewaucan River, 659.
"Payment"—See Moumal v. Parkhurst, 248.
"Penalty"—See Moumal v. Parkhurst, 248.
"Permanent"—See Roseburg Nat. Bank v. Camp, 67.
"Public"—See Turnidge v. Thompson, 637.
"Stay"—See Gearin v. Fleckenstein, 146.
"Trial"—See Warm Springs Irr. Dist. v. Pacific Livestock Co., 19.
"Use"—See Camenzind v. Freeland Furniture Co., 158.

WORK AND LABOR.

Work and Labor—Quantum Meruit—Issues—Rescission.

1. Contention that complaint, based on *quantum meruit* and showing there was written contract, is fatally defective for absence of allegation of rescission, is untenable, where answer pleads abandonment of contract by plaintiffs, and reply admits same and justifies it; allegations sufficiently raising issue of rescission. (Franconi v. Graham, 619.)

Work and Labor—Breach of Contract—Quantum Meruit.

2. When contract for services provides for payments at specified intervals, and installments are not paid when due, aggrieved parties may abandon work and recover on *quantum meruit*. (Franconi v. Graham, 619.)

Work and Labor—Prior Breach by Plaintiffs—Effect.

3. Where contract for cutting cordwood provided plaintiffs should have 1,200 cords cut by March 1st, and they failed to comply, but defendants did not object, in plaintiffs' action for services after defendants' subsequent breach, plaintiffs can recover. (Franconi v. Graham, 619.)

WORKMEN'S COMPENSATION ACT.

See Negligence, 1.

Construction of Workmen's Compensation Act.

See Master and Servant, 14.